Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1994

HARLEYSVILLE LIFE INSURANCE COMPANY,

Petitioner,

vs.

NANCY MARDELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee who is dismissed in violation of the Age Discrimination in Employment Act and/or Title VII of the Civil Rights Act of 1964 is barred from obtaining any remedy if, solely as the result of unlawful dismissal and the litigation challenging it, the employer discovers another basis for dismissal, question previously accepted for review by the Court in *McKennon v. Nashville Banner Publishing Co.*, No. 93-1543.

2. Whether the employer is barred from a defense using after-acquired evidence of fraud if the employer can demonstrate that, but for the employee's fraud as to her qualifications, the employee would never have been hired in the first place.

3. Whether the ADEA or Title VII categorically precludes at the liability stage admission of any evidence acquired post-termination even where such evidence is relevant to impeach or to corroborate the employer's required showing of a non-discriminatory motive.

4. Whether, even if an employee's fraud does not completely bar her from obtaining any remedy, the date to which back pay runs should be determined by the date of judgment.

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were, as stated in the caption, Nancy Mardell and Harleysville Life Insurance Company, a Pennsylvania corporation.

The parent company of Harleysville Life Insurance Company is Harleysville Mutual Insurance Company. Harleysville Life Insurance Company has no subsidiaries.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

OPINIONS BELOW

The decision of the Court of Appeals for the Third Circuit is reported at 31 F.3d 1221. It appears as Appendix I, 1a-43a, *infra*. The opinion of the United States District Court for the Western District of Pennsylvania dated April 27, 1993 is reported at 854 F. Supp. 378. It appears as Appendix II, 44-55a, *infra*. The Third Circuit's order on Harleysville's petition for rehearing appears as Appendix III, 56a, *infra*.

JURISDICTION

The opinion of the court of appeals was filed on August 2, 1994. A timely petition for rehearing by the panel (for purposes of clarification) was filed by defendant-appellee Harleysville Life Insurance Company on August 16, 1994. The Third Circuit,

by order dated September 21, 1994, denied the petition. The order appears in Appendix III, 56a, *infra*. The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Age Discrimination in Employment Act (ADEA) (1967, as amended), 29 U.S.C.A. §§ 623, 626 (1985), and of Title VII of the Civil Rights Act of 1964 (1964, as amended), 42 U.S.C.A. §§ 2000e-2 and 2000e-5 (1981), are reproduced at Appendix IV, 57a-59a, *infra*.

STATEMENT

1. Mardell's Employment

Harleysville Life Insurance Company (Harleysville) hired Nancy Mardell (Mardell) as Life Manager (Regional Director) of its Pittsburgh office in February, 1988. On the résumé Mardell composed to apply for this position, and on her job application, Mardell falsely represented that she had a college degree and made material misrepresentations about her professional experience. (App. II, 49a-51a, *infra*). Harleysville relied on these misrepresentations when it hired her. After two years of employment marked by complaints related to her abilities and unfavorable evaluations, Harleysville terminated Mardell for stated reasons of poor performance. (App. I, 5a, *infra*). Mardell then filed charges of age and sex discrimination in connection with her termination with the EEOC and then in district court, invoking jurisdiction under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5, the Age Discrimination in Employment Act, 29 U.S.C. § 626, and 28 U.S.C. § 1331 (general federal question).[1] Harleysville did not discover Mardell's misrepresentations about her qualifications and professional experience until after suit was

[1]Mardell also raised a pendent state claim under the Pennsylvania Human Relations Act, 43 Pa. C.S. § 951, *et seq.*

filed. Indeed, in her initial deposition in this case, Mardell reasserted those misrepresentations under oath.[2]

2. The Summary Judgment Motion

Harleysville filed a motion for summary judgment in district court on the ground that even if it had discriminated against Mardell, Mardell's résumé fraud precluded her entitlement to any remedy. The district court, following the Tenth Circuit's decision in *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), the Sixth Circuit's decisions in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993), and *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992), and the Seventh Circuit's decision in *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992), granted the motion. The court found that there was no dispute that Mardell's misrepresentations were material, that they related directly to Harleysville's decision to hire her, that Harleysville relied on them, and that Mardell would not have been hired but for her misrepresentations and would have been terminated immediately upon their discovery. The allegation of Harleysville's discrimination was not before the court, and no evidence was presented on that point.

3. The Third Circuit Proceedings

Mardell's appeal to the Third Circuit, pursuant to 28 U.S.C. § 1291, was filed on June 3, 1993 and argued on December 9, 1993. Although the circuit court's opinion recites a number of Mardell's uncorroborated assertions, those facts were not part of

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[2]Mardell resisted Harleysville's efforts during discovery to learn the truth about her actual educational and professional qualifications. Until Harleysville filed a motion to compel, Mardell refused to supply her college transcripts or authorizations for them. (See SRRa 1-4, 12-38, 44, 134-135).

the evidentiary material in the summary judgment record nor were they properly before that court. (See App. I, 4a, n.2, *infra*).

The Third Circuit reversed. The court rejected the Tenth Circuit's "Summers rule" and the holdings of the Sixth Circuit in *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994) and *Milligan-Jensen*, the Eighth Circuit in *Welch v. Liberty Machine Works, Inc.*, 23 F.3d 1403 (8th Cir. 1994) and the Seventh Circuit in *Washington v. Lake County*. (See App. I, 3a, 11a-14a, *infra*). Acknowledging a circuit split and the pendency of *McKennon v. Nashville Banner* before this Court (App. I, 11a and n.7, *infra*), the panel held that after-acquired evidence of résumé fraud cannot be a "defense to liability" in a Title VII or ADEA case.

> For all the foregoing reasons, we hold that after-acquired evidence is inadmissible, because irrelevant, at the *liability* stage of a cause of action brought under Title VII or ADEA. We do not rule out the potentiality that such evidence may serve as the foundation for a claim of fraud, conversion, or the like by the employer against the plaintiff in an appropriate forum, but only that it may not be introduced substantively for the purpose of defending against liability. We must accordingly reverse the district court's grant of summary judgment to Harleysville and remand for further consideration.

(App. I, 36a, *infra*) (emphasis in the original).

On the issue of remedy, the panel stated that, regardless of after-acquired evidence of résumé fraud or employee misconduct, back pay should, in the usual case, run until the day of judgment. (App. I, 39a-40a, *infra*). Thus the employer must in effect continue to compensate an employee up to a date which it cannot control and which will be determined principally by the state of the district court's docket.

Harleysville filed a petition for rehearing by the panel addressed to the scope of the panel's "liability stage" holding and its apparent preclusion of the use of after-acquired evidence for any purpose. The petition pointed out that, under the panel's ruling, an employer would be unable to corroborate its termination for reasons of poor performance by evidence that its initial judgment that the employee was qualified had been based on false premises. Moreover, under the breadth of the panel's ruling, it would be precluded from attempting to impeach the plaintiff by proving that in this very case, in deposition, she lied under oath.

The panel denied this petition, leaving intact its holding that no evidence of plaintiff's fraud could be admitted at the liability stage either to impeach plaintiff's trial testimony or to corroborate the employer's required showing of a non-discriminatory reason for termination.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the court has already granted certiorari in *McKennon v. Nashville Banner*, a case presenting the same question as the first question presented here. This is an important question in terms of interpretation and implementation of federal discrimination laws.

Because this case involves fraud directly related to an employee's obtaining the position from which she was later discharged, it presents additional certworthy issues separate from those presented in *McKennon*. The Third Circuit's opinion leaves an employer liable for damages in an employment discrimination action even if he can demonstrate that, but for the employee's fraud as to her qualifications, she never would have been hired in the first place. It thus abrogates in Title VII and ADEA cases the usual rule that a contract obtained by fraud is voidable by the party defrauded. It also leaves an employer liable

for back pay to a former employee guilty of résumé fraud up to an arbitrary date set solely by events outside the employer's control.

1. Pendency of *McKennon* case

This Court has pending before it *McKennon v. Nashville Banner*, in which the question presented is whether an employee, assumed to have been discharged in violation of a federal anti-discrimination law (ADEA), is barred from obtaining any remedy "if, after the [alleged] violation has occurred, new information is discovered which the employer claims would have provided a basis for dismissing the employee before the violation." *McKennon v. Nashville Banner*, No. 93-1543, Brief for Petitioner at i.

In *McKennon* the Sixth Circuit reaffirmed its rule that "after-acquired evidence is a complete bar to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence." 9 F.3d at 542. The Third Circuit's holding in this case is that after-acquired evidence can never be a complete bar to recovery. Thus, an affirmance of the *McKennon* case should invalidate the *Mardell* holding and require reversal of the Third Circuit's opinion.

2. Résumé Fraud as to Qualifications

There are reasons for granting certiorari independent from *McKennon* which, if not resolved, will continue the inconsistencies in holdings among the circuits. If the employer can prove that the employment contract itself was obtained by fraud—an issue on which it has the burden of proof—a court need never reach a discrimination claim based on the termination of that contract.

McKennon is a misconduct on the job case—copying and taking home confidential documents—whereas *Mardell* is a résumé fraud case—deliberately committed to obtain the employment—which gave rise to employee status and tainted the employment relationship *ab initio*. *See* question presented in *O'Driscoll v. Hercules, Inc.*, 12 F.3d 176 (10th Cir. 1994), *petition for cert. filed* 62 U.S.L.W. 3757 (No. 93-1728) (April 1, 1994); *Johnson v. Honeywell Info. Sys.* (résumé fraud case following *Summers*).

Mardell's false picture of her qualifications has a nexus to Harleysville's stated reasons for termination—inability to perform as expected and required. In contrast, McKennon's after-discovered misconduct was not related to the stated reasons for her termination, but rather would have provided a totally separate basis for dismissal.

The district court granted summary judgment because it determined that there were no issues of fact as to whether Mardell's misrepresentations or omissions were material, related directly to her qualifications for being hired, and were relied on by Harleysville in deciding to hire her. The usual rule is that a contract obtained by fraud is voidable. Restatement (Second) of Contracts § 164(1) (1981). *See e.g., Kungys v. U.S.*, 485 U.S. 759, 787-88, 108 S. Ct. 1537, 1555 (1988) (concurring opinion); *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994). To the extent the Third Circuit's holding prohibits a court from applying this rule to bar all relief it conflicts with recognized principles adopted by this Court. Even a generous reading of the Third Circuit's opinion results in an illogical result that it fails to recognize. Although it acknowledges a cause of action for fraud (App. I, 21a, n.16, 26a, 36a, *infra*), it dismisses with only cursory analysis the applicability of the special remedy that contracts entered

because of fraud are voidable by the defrauded party. The circuit's opinion totally emasculates this special remedy by its interpretation of Title VII and the ADEA. This Court should decide whether the employment discrimination statutes exempt employees who claim discrimination in termination of the employment contract from the operation of this rule.

Allowing the employer to prove that fraud in order to prove a plaintiff's lack of entitlement to a remedy within the over-all context of the discrimination action would not interfere with the "settled framework" (App. I, 18a, *infra*) of liability proof and would comport with the recognition of other complete "defenses" to discrimination claims such as the statute of limitations, laches, or prejudicial conduct of a case, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-25, 95 S. Ct. 2362, 2374-75 (1975); *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355, 373, 97 S. Ct. 2447, 2458 (1977), and the failure to mitigate damages.

Moreover, Congress directed, in Title VII and the ADEA, that courts should grant only such relief "as may be appropriate." 29 U.S.C. § 626(b); 42 U.S.C. § 2000e-5(g).[3] This Court has held that it is appropriate to deny relief to one who has committed fraud and deceit "relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814, 65 S. Ct. 993, 997 (1945). *See ABF Freight Sys., Inc. v. N.L.R.B.*, _____ U.S. _____, 114 S. Ct. 835, 842 (1994) (Scalia, J. and O'Connor, J., concurring).

3. Preclusion of Résumé Fraud Evidence.

This Court has carefully set out the order of proof and the allocation of burdens in the liability phase of cases under Title

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[3]Included in Appendix IV, 58a, 59a, *infra*.

VII and the ADEA. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981) and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). In the event of a trial on the merits, after Mardell puts into evidence her claims that Harleysville terminated her because of her age or sex, Harleysville will go forward with evidence of its non-discriminatory reasons. It intends to show that Mardell was terminated because of poor performance. In Harleysville's satisfying its burden (of production under *Burdine* or of persuasion under *Price Waterhouse*), résumé fraud related to job qualifications is relevant in a way that on-the-job fraud is not. When Harleysville claims that it discharged Mardell because she was not competent, the natural question arises as to why she was hired in the first place. And the inference is that Harleysville must have felt she was qualified then. It is against that backdrop that certain after-acquired evidence is clearly important, indeed critical, to make the employer's showing of its non-discriminatory reason. The employee then may attempt to prove that the proffered reason is a sham. *St. Mary's Honor Center v. Hicks*, _____U.S. _____, 113 S. Ct. 2742 (1993).

Here Mardell lied. Harleysville believed her and hired her. The evidence fills in the blank as to why Harleysville's original judgment, which is called into question, that she would be qualified can be consistent with its later judgment that she was not. The judgment of the employer is thus an issue at the liability stage, and the validity and truthfulness of that judgment is corroborated by the actual facts of Mardell's background qualifications. But the Third Circuit rule would absolutely preclude the employer from using that evidence. Thus by arbitrarily denying the employer the right to use critical evidence in its stage of the case, the Third Circuit's ruling would re-allocate the burdens of proof which this Court has painstakingly developed.

4. Remedies.

The Third Circuit's opinion, after holding that after-acquired evidence is precluded at the liability stage (App. I, 36a, *infra*), addresses issues of how after-acquired evidence may be used in the remedies stage of a discrimination case. (App. I, 36a, *et seq., infra*) Among those circuits that do not hold that after-acquired evidence bars all remedies, there is a split. One view, adopted by the Third as well as the Eleventh Circuit, is that after-acquired evidence may serve to limit prospective, but not retrospective remedies, and therefore should not toll an employer's liability for back pay. The other view, adopted by the Seventh Circuit, is that it may limit retrospective remedies as well. Both views profess to take into account the interests of both employer and employee. Guidance by this Court on where the line should properly be drawn is needed to resolve this split.

Invoking the "make-whole" purpose of Title VII, the Eleventh Circuit opts for a back pay-to-date-of-judgment rule. *Wallace v. Dunn Const. Co.*, 968 F.2d 1174 (11th Cir. 1992), citing *Albemarle Paper Co. v. Moody*, 422 U.S. at 418, 95 S. Ct. at 2372. This purpose, according to *Wallace*, outweighs any interest of the employer "in freedom to make lawful decisions" (968 F.2d at 1182), i.e. those based on the after-acquired evidence. The Eleventh Circuit also believes that an alternative approach—to cut off back pay when the employer actually acquired the evidence—would put an employee in a protected class who sues for discrimination in a worse position than she would be otherwise. 968 F.2d at 1182. These same considerations, together with that of deterrence, also underlie the Third Circuit's approach. But what the judgment date cut-off does is make the length of the damages period dependent on factors totally beyond the employer's control (such as crowded court dockets) and, to some extent, within the employee's (such as delay in filing her lawsuit).

In choosing a different rule—to cut off back pay as of the time the résumé fraud is discovered—the Seventh Circuit, in *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993), reasons that it is unfair to further penalize the employer once it learns that its employee has committed résumé fraud. *See Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319, n.2 (7th Cir. 1989). Thus, in the Seventh Circuit's view, the employer's free choice—to which the Third and the Eleventh circuits give primacy only where the issue is reinstatement (or front pay)—deserves to be afforded greater weight in the remedies equation.

Earlier rulings of this Court suggest an approach which may be more consonant with the Seventh Circuit's holding than the Third and Eleventh's. For example, in *Albemarle Paper Co. v. Moody*, 422 U.S. at 424, 95 S. Ct. at 2375, this Court recognized that there may be circumstances, including the plaintiff's own conduct, where a trial court could rightfully deny back pay. In addition, employers can cut off back pay liability by tendering an unconditional job offer to an employment discrimination plaintiff, even if the plaintiff does not accept. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 102 S. Ct. 3057 (1982).

Without this Court's direction on remedies issues, the split among the circuits will continue, and further splintering of views on damages is likely.

CONCLUSION

For all of the above reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX I

Filed August 2, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3258

NANCY MARDELL,
Appellant

v.

HARLEYSVILLE LIFE INSURANCE COMPANY,
a Pennsylvania Corporation

On Appeal From the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 91-01493)

Argued: December 9, 1993

Before: BECKER, NYGAARD, *Circuit Judges*,
and YOHN, *District Judge**

(Filed August 2, 1994)

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*The Honorable William H. Yohn, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

Nancy Mardell appeals from the grant of summary judgment for defendant Harleysville Life Insurance Company ("Harleysville") by the District Court for the Western District of Pennsylvania in an employment discrimination suit alleging age and gender discrimination. Mardell brought several claims pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C.A. §§ 2000e to 2000e-17 (1981 & Supp. 1994), the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-34 (1985 & Supp. 1994), and the Pennsylvania

Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 951-63 (1991 & Supp. 1994). The district court relied upon the rule pioneered by the Tenth Circuit Court of Appeals in *Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700 (10th Cir. 1988) to hold that Harleysville's "after-acquired evidence" of Mardell's alleged resume fraud provided a complete defense to Mardell's causes of action. "After-acquired evidence" in an employment discrimination case denotes evidence of the employee's or applicant's misconduct or dishonesty which the employer did not know about at the time it acted adversely to the employee or applicant, but which it discovered at some point prior to or, more typically, during, subsequent legal proceedings; the employer then tries to capitalize on that evidence to diminish or preclude entirely its liability for otherwise unlawful employment discrimination.

We reject the *Summers* rule in favor of one circumscribing the use of after-acquired evidence to the remedies phase of an employment discrimination suit brought pursuant to Title VII or ADEA.[1] We will therefore reverse the district court's order granting summary judgment to Harleysville, and remand the case for further proceedings consistent with this opinion.

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[1]Throughout the following discussion we will generally treat claims arising under Title VII and ADEA similarly insofar as no party has given us reason to distinguish between them for purposes of the principal issue before us, and we have thought of no reason for doing so ourselves. *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 621 (1985) (applying Title VII precedent to ADEA because "the substantive [(but not the procedural or remedial)] provisions of ADEA were derived in *haec verba* from Title VII" (quoting *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 584, 98 S. Ct. 866, 872 (1978)); *Armbruster v. Unisys Corp.*, No. 93-1333, Mem. op. at 20 n.10 (August 1, 1994); *Miller v. Cigna Corp.*, No. 93-1773, 1994 WL 283269 at *4, *12 n.7 (June 28, 1994); *Smithers v. Bailar*, 629 F.2d 892, 894-95 (3d Cir. 1980) (applying Title VII's framework to an ADEA claim).

I. FACTS AND PROCEDURAL HISTORY[2]

Harleysville hired Mardell as a Branch Life Manager in February 1988 to manage insurance agents.[3] Mardell appears from the record to have been an accomplished life insurance agent. (A 57.) Before accepting the position with Harleysville, Mardell had been employed by Prudential Life Insurance Company ("Prudential") for eleven years. (A 58, 66, 68.) William Shelow, who was being promoted out of the position at Harleysville for which Mardell would be hired, had approached Mardell at Prudential about replacing him in his soon-to-be vacated position. (A 69.) Shelow was familiar with Mardell's work at Prudential and felt that she would excel as a Life Manager for Harleysville. (A 70.)

In December 1989, Mardell became the first Harleysville employee ever to be placed on probation. William Forloine, Mardell's direct supervisor and Harleysville's senior vice president of marketing and sales, avowedly effected this action for poor performance, even though at the time he imposed the probation Mardell's work was improving and she had surpassed the yearly goal he had set for her (A 76-78; SA 94, 99, 165-66). The terms of probation required Mardell to meet or exceed her quota

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[2]For purposes of Harleysville's summary judgment motion, we view the facts in the light most advantageous to Mardell, and resolve all disputed issues of fact in her favor.

Inasmuch as some of the facts pertaining to Mardell's prima facie case of discrimination and to the immateriality of her misrepresentations are drawn from portions of Mardell's and others' depositions that Mardell did not make part of the record in the district court but submitted in her appendix to her brief to this Court, we as a court of review may not consider them for substantive purposes. *See* FED. R. APP. P. 10(a). 30(a); *Jaconski v. Avisun Corp.*, 359 F.2d 931, 936 & n.11 (3d Cir. 1966); *Reed v. Amax Coal Co.*, 971 F.2d 1295, 1299 n.3 (7th Cir. 1992). We mention that testimony just as informative background to flesh out the particulars of the dispute; we do not consider it on the merits.

[3]During Mardell's tenure the job title was reclassified as a Regional Director.

every month at pain of dismissal, a requirement not imposed on any of her male peers or supervisors and one which set a standard that most of Harleysville's managers commonly failed to fulfill (A 76-77, 80, 133-34; SA 166).

In February 1990, Harleysville discharged Mardell, who then was 52 years old. (A 15, 59.) Four months later Harleysville hired a 40 year old male to replace her. (A 131-32.) Harleysville attributed its termination decision to Mardell's poor work performance. Specifically, Harleysville contends that during Mardell's tenure, sales declined in her region, as did the number of independent insurance agents with whom she maintained ongoing contact. The company also faulted her for improperly implementing its new marketing plan, failing to learn to use its new computer system effectively, making poor presentations, and being unable to work suitably with some co-workers and outside agents (SA 164-66).

Mardell disputes Harleysville's asserted reasons for its decision to discharge her, contending instead that gender and/or age discrimation was the cause. Mardell combined the aforementioned circumstantial evidence of disparate treatment (having been the only person placed on probation and subjected to a quota, and having been replaced by a younger man) with direct evidence of her supervisor's comments and attitudes indicative of sex and/or age bias. She testified that Forloine had told her that as a female he had higher expectations of her; that she "wasn't one of the boys" and "couldn't be a good old boy;" that he did not think her position "was a job for a woman;" and that many of her agents would think of her "as a wife." She testified further that once he had accused her, without foundation, of missing work because she "just wanted to stay home and watch the soaps," and that she had become aware of a meeting before all the company's vice presidents and regional directors held after her termination at which he allegedly stated that he

"would never have another female regional director." (A 71, 73-75.) She added that he had frequently mentioned her age and that he had told her once that she "should be home playing with [her] grandchildren." (A 73.)

During discovery in the instant case, Harleysville unearthed several instances of employment application and resume misrepresentation committed by Mardell. First, Mardell represented that she had obtained a Bachelor of Science degree from the University of Pittsburgh, whereas in fact the university had never issued a diploma to her: the university's records indicate that she has yet to complete all her work in two related courses required for her degree. (A 82-84.) Mardell attributed her misrepresentation to a mistaken belief that she had earned a Bachelor of Science degree. She explained that she had belatedly completed and submitted all required work for those two courses and had been informed by her professor that he would file a grade change report, but that for some unknown reason the university's official records never credited the supposed report. (A 84, 96-100.) Notably, Harleysville apparently did not consider the possession of a college degree a prerequisite to employment as a Branch Life Manager, and was prepared to hire the "mental equivalent" of a college graduate. (A 123.)

Second, Harleysville learned that Mardell had also misrepresented her professional experience on both her employment application and resume. Mardell had listed in the "employment history" section of the application form and the "professional experience" section of her resume that she had served as a "writer-interviewer" at a local hospital, as a therapist at a mental health center, and as a manager and public relations director at a hotel. (A 58.) Although Mardell had performed most of those tasks as she described them on those documents (A 60-64, 67-68, 84-90, 104-05), in both documents she had (at a few points greatly) exaggerated some of her specific duties (A 63,

67-68, 104; SA 131-32); misrepresented that the hospital and mental health care center positions were remunerated (in fact she took them on as unpaid field course work to earn college credit) (A 61-62, 85, 89-90); and misstated the dates she had performed those activities (A 58, 90; SA 121, 145).

Buoyed by its admittedly post-termination discoveries, Harleysville moved for summary judgment. It attached to its motion affidavits by Glyn Mangum, the vice-president of sales who had made the decision to hire Mardell, and Forloine. Mangum averred that he had relied on Mardell's application and resume when considering her for the Branch Life Manager position and that, had he known of her misrepresentations, he would not have hired her. (SA 84-85, 87.) Forloine averred that he had considered Mardell's alleged college degree to be a "plus" when he interviewed her for the position; that, had he known of her misrepresentations at the time of her interview, he would have "strongly recommended that she not be hired;" and that, had he at any time apprehended her misrepresentations, he would have, consistent with Harleysville's policy as declared by the employment application form Mardell had completed, "terminated her immediately." He added that, in context of what Harleysville now knows to be true about Mardell, it would not voluntarily reemploy her (SA 95, 99).

Basing its summary judgment motion on the after-acquired evidence doctrine, Harleysville assumed *arguendo* that it had impermissibly discriminated against Mardell, but essentially contested Mardell's standing to sue and, in the alternative, questioned whether she had realized an injury (SA 61-71). On April 27, 1993, the district court entered its Memorandum and Order granting Harleysville's motion (A 5). In the process, it applied a variant of the *Summers* rationale adapted to resume fraud cases and held that, because of her fraud in gaining her employment,

Mardell had suffered no legally cognizable injury even if Harleysville had willfully discriminated against her on the basis of her age and/or sex. Given that disposition, the court did not reach the question whether Mardell had made out a prima facie case of sex and/or age discrimination. This appeal followed (A 5).[4]

II. THE RELEVANT LEGAL BACKGROUND

A. General Background

Experience with the federal employment discrimination laws has culminated in the division of disparate treatment suits into three classes: pure discrimination, pretext, and mixed-motives cases.[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), as embellished by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981) and *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), establishes a flexible three-part model to allocate the shifting burdens of production in the first two classes of individual disparate treatment cases (pure discrimination and pretext). *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989) supplies the procedure for proving intentional discrimination in mixed-motives cases. Numerous opinions of this Court have explained the evidentiary regimes that the *McDonnell*

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[4]We exercise plenary review over the district court's grant of summary judgment and employ the same standard applicable in the district court. *Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532, 536 (3d Cir. 1994). We affirm a grant of summary judgment if " 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.' " *Id.* at 536 n.3 (quoting FED. R. CIV. P. 56(c)).

The facts of this case transpired before the effective date of the Civil Rights Act of 1991 (the "1991 Act"), Pub. L. No. 101-166, 105 Stat. 1075 (1991). Hence, the substantive and remedial changes made by the 1991 Act do not apply to this case. see *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1505-06 (1994), but occasionally we will make references to them and the accompanying legislative history because that material is generally informative.

[5]For purposes of this opinion, we ignore the disparate impact theory of employer liability.

Douglas/Burdine/Hicks line of cases and *Price Waterhouse* have established, but for the benefit of the untutored reader we summarize them in the margin.[6]

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[6]In a case of failure to hire or promote, the plaintiff first

> must carry the initial burden under the statute of establishing a prima facie case of [unlawful] discrimination. This may be done by showing (i) that he belongs to a [protected category]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. 93 S. Ct. at 1824. If the plaintiff succeeds, the burden of production transfers to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* In the unlikely event that the employer at this juncture remains silent, the case falls within the set of "pure discrimination" cases and "the court must enter judgment for the plaintiff." *Burdine*, 450 U.S. at 254. 101 S. Ct. at 1094.

If the defendant does introduce into evidence a legitimate reason for its actions, the case becomes a "pretext" case. In that event the employer need not prove that the tendered reason *actually* motivated its behavior, as throughout this burden-shifting paradigm the ultimate burden of proving intentional discrimination rests at all times with the plaintiff. *See id.* at 253, 254, 256, 101 S. Ct. at 1093, 1094, 1095. Once the employer answers its relatively light burden by articulatng a legitimate reason for the unfavorable employment decision, the burden of production rebounds to the plaintiff, who must now show by a preponderance of the evidence that the employer's explanation is pretextual.

To accomplish this, the plaintiff must convince the factfinder "*both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 113 S.Ct. at 2752; *see id.* at 2754 ("It is not enough . . . to *dis*believe the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." (emphasis in original)). In other words, since the plaintiff's making out a prima facie case only shifts the burden of *production* to the employer, the employer need only articulate *some* legitimate reason for its action to meet the plaintiff's serve. The factfinder's rejection of that proffered legitimate reason *permits*, but does not *compel*, a verdict for the plaintiff. *See Hicks*, 113 S. Ct. at 2749. To prevail, the plaintiff must ultimately prove not that the illegitimate factor was the sole reason for the decision, but that the illegitimate factor was a

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determinative factor of the employment decision, that is, that but for the protected characteristic, the plaintiff would have been, for example, hired or promoted. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (ADEA) (holding that "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in [the decisionmaking] process and had a determinative influence on the outcome").

In *Price Waterhouse*, the Supreme Court borrowed the mixed-motives standard applied originally in a mixed-motives constitutional tort case, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977), and adapted it for mixed-motives cases under Title VII. *See Price Waterhouse*, 490 U.S. at 248-50, 109 S. Ct. at 1789-90 (plurality); *id.* at 258-59, 109 S. Ct. at 1795 (White J., concurring); *cf. id.* at 277-78, 109 S. Ct. at 1805 (O'Connor, J., concurring); *see also East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 404 n.9, 97 S. Ct. 1891, 1897 n.9 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 369 n.53, 97 S. Ct. 1843, 1872 n.53 (1977). A mixed-motives case is one in which both legitimate and illegitimate factors contribute to the employment decision. *See Price Waterhouse*, 490 U.S. at 232, 109 S. Ct. at 1781 (plurality). Such a case differs from a pretext case in that the plaintiff must present evidence of illegal discrimination "sufficiently strong to shift the burden of proof to the employer," meaning that the plaintiff must adduce "direct evidence" of discrimination (that is, more persuasive evidence than the *McDonnell Douglas/Burdine* prima facie case). *See Armbruster v. Unisys Corp.*, No. 93-1333, Mem. op. at 22-23 (3d Cir. August 1, 1994); *Miller*, No. 93-1773, 1994 WL 283269, at *12 n.6; *Hook v. Ernst & Young*, No. 92-3724, 1994 WL 283266, at *8-*9 (3d Cir. June 28, 1994); *Price Waterhouse*, 490 U.S. at 277-78, 109 S. Ct. at 1805 (O'Connor, J., concurring).

To rebut a plaintiff's case-in-chief in a mixed-motives case (that is, once the plaintiff has met his or her burden of proving an illegitimate factor "played a motivating [or substantial] part in an employment decision"), the employer must prove that "it would have made the same decision even if it had not allowed [the illegitimate factor] to play such a role." *Price Waterhouse*, 490 U.S. at 244-45, 109 S. Ct. at 1787-88 (plurality); *see id.* at 242, 109 S. Ct. at 1786 (plurality). The employer's rebuttal is thus an affirmative defense. *See id.* at 246, 109 S. Ct. at 1708 (plurality); *id.* at 259-60, 109 S. Ct. at 1795 (White, J., concurring); *id.* at 261, 109 S. Ct. at 1796 (O'Connor, J., concurring). We note, however, that to the extent that *Price Waterhouse* barred all liability when the employer can show it would have taken the same action even had it not had any illegitimate motives, the 1991 Act overturned it. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075-76 (codified at 42 U.S.C.A. §§ 2000e-2(m), 2000e-5(g)(2)(B) (Supp. 1994)).

B. Other Circuits' Approaches to After-Acquired Evidence

The courts of appeals have grouped into two primary (albeit splintered) camps regarding the relevancy of after-acquired evidence of resume and/or application fraud or employee misconduct on the job.[7]

1. Courts Finding After-Acquired Evidence May Bar Liability

The Tenth Circuit formed the first camp with its seminal *Summers* decision. *Summers* held that after-acquired evidence, at least if material, bars all relief and hence effectively operates as a complete defense to liability. Based on after-acquired evidence of Summers' rampant on-the-job misconduct,[8] State Farm moved for summary judgment to diminish the relief Summers could recover were he to prevail at the liability phase of trial. *See Summers*, 864 F.2d at 702-03. The Tenth Circuit held that the after-acquired evidence of Summers' on-the-job misconduct would not only limit Summers' remedies, but, by precluding Summers

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[7]The Supreme Court has granted certiorari to resolve this split during its next Term. *See McKennon v. Nashville Banner Publishing Co.*, 114 S. Ct. 2099 (1994). At the time we heard oral argument, certiorari had not yet been granted in *McKennon* and the parties asked the panel (and it agreed) to decide the case and not hold it in abeyance pending the probable grant of certiorari so that the case can proceed to a timely resolution. *Cf. Milligan-Jensen v. Michigan Tech Univ.*, 114 S. Ct. 22 (1993) (dismissing the writ of certiorari in an after-acquired evidence case).

[8]Summers, a claims adjuster for the defendant insurance company, had been reprimanded on several occasions for falsifying company records and had eventually been placed on probationary suspension for two weeks. About six months later, State Farm discharged him not because of his falsification of records "but because of his poor attitude, inability to get along with fellow employees and customers. and similar problems dealing with the public and co-workers." Four years later, during discovery, State Farm learned that on at least 150 occasions Summers had falsified company records, eighteen instances of which falsifications occurred after his return from suspended status.

from any relief, the evidence would effectively avert State Farm's *liability*.

The court understood that technically *McDonnell Douglas* presupposed that a defendant could avert liability only with a legitimate, nondiscriminatory motive known to the employer at the instant of its actions. *See id.* at 705. Yet it reasoned—apparently because State Farm would have fired him had it known of his transgressions—that "while . . . after-acquired evidence cannot be said to have been a 'cause' for Summers' discharge in 1982, it is relevant to Summers' claim of 'injury,' and does itself preclude the grant of any present relief or remedy to Summers." *Id.* at 708. The court likened the plaintiff's situation to a "masquerading doctor," meaning one who was not really a doctor but who had pretended to be one, discharged for discriminatory reasons, who "would be entitled to no relief." *Id.*

Since *Summers*, courts have allowed after-acquired evidence to bar the employer's liability in two general categories of cases: resume and/or application fraud cases, and misconduct on the job cases. In a case of resume or application fraud, the employer typically asserts that, had it known of the plaintiff's misrepresentation(s), it would never have hired him or her. *See Welch v. Liberty Machine Works, Inc.*, 23 F.3d 1403, ___WL at *1, *3 (8th Cir. 1994) (brought under the Employee Retirement Income Security Act, 29 U.S.C.A. §§ 1001-1461 (1985 & Supp. 1994), and the Missouri Human Rights Act, MO. ANN. STAT. §§ 213.010-.137 (Vernon 1986 & Supp. 1994)). The employer may alternatively argue that, had it at any time after the hiring found out about the misrepresentation(s), it would have promptly fired the plaintiff.[9] *See O'Driscoll v. Hercules, Inc.*, 12 F.3d 176,

[9]Some courts distinguish between "would not have hired" and "would have fired" cases on the basis that an employer would be more hesitant to fire a competent, capable employee than to not hire the applicant in the first place.

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177-78 (10th Cir. 1994) (expanding the *Summers* holding from misconduct to after-acquired resume and application fraud cases), *petition for cert. filed,* 62 U.S.L.W. 3757 (Apr. 1, 1994) (No. 93-1728); *Reed v. Amax Coal Co.,* 971 F.2d 1295, 1298 (7th Cir. 1992) (per curiam). In some cases employers advance both arguments in the alternative. *See Milligan-Jensen v. Michigan Technological University,* 975 F.2d 302, 304 n.2 (6th Cir. 1992), *cert. dismissed,* 114 S. Ct. 22 (1993); *Washington v. Lake County, Ill.,* 969 F.2d 250, 253 (7th Cir. 1992); *Johnson v. Honeywell Information Systems, Inc.,* 955 F.2d 409, 414-15 (6th Cir. 1992);[10] *cf. Dotson v. United States Postal Service,* 977 F.2d 976, 978 (6th Cir.) (per curiam) (holding that the plaintiff's employment application misrepresentations rendered him unqualified for the job without addressing whether the employer would not have hired or would have fired him therefor), *cert. denied,* 113 S. Ct. 263 (1993). Obviously in job misconduct cases (like *Summers*), only a variant of the latter "would have fired" argument can be made. *Cf. McKennon v. Nashville Banner Publishing Co.,* 9 F.3d 539, 542-43 (6th Cir. 1993) (concluding that the plaintiff's job misconduct precluded her "claim of injury" and that

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See, e.g., Washington v. Lake County, Ill., 969 F.2d 250, 254, 255 n.5 (7th Cir. 1992). In *Washington,* the Seventh Circuit held that in cases where the employee actually was employed for some time, the "would not have hired" inquiry is irrelevant because "the temporal focus is on the time of the adverse employment decision." *Id.* at 256. As to the "would have fired" inquiry, however, the court somewhat inconsistently with its prior holding construed *Price Waterhouse* to allow the employer to defend its actions with after-acquired evidence, stating that in such situations "the employer must show by a preponderance of the evidence that, if acting in a race-neutral manner, it would have made the same employment decision *had it known of the after-acquired evidence.*" *Id.* at 255 (emphasis supplied).

[10]Although *Johnson* involved a cause of action under Michigan's Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS §§ 37.2101-.2804, the court construed it "in the same manner as its federal counterpart." 955 F.2d at 415 n.1.

consequently she was not entitled to "the grant of any relief or remedy"), *cert. granted*, 114 S. Ct. 2099 (1994).

2. *Courts Finding After-Acquired Evidence May Not Bar Liability*

The opposing camp, exemplified by the Eleventh Circuit in *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (1992) when it openly broke ranks with *Summers*,[11] allows after-acquired evidence to come in only at the remedies stage to slim down the

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[11]The first court of appeals after-acquired evidence case actually rejecting *Summers* was handed down by the Seventh Circuit in *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (1989), an ADEA suit. As the employer brought out during discovery, the plaintiff had falsified his college credentials on his resume. *See id.* at 1317. The district court had held that the plaintiff's misrepresentation precluded the plaintiff from making out a prima facie case because he could not show that he was qualified for the position. The court of appeals, cognizant of the *Summers* decision, rejected the district court's approach:

> By narrowly focusing on [the plaintiff's] initial burden, the district court was distracted from the real issue in this case. At issue is the lawfulness of Smith's termination. His resume fraud clearly had nothing to do with that; it surfaced only after [the plaintiff] was terminated and after this suit was commenced, Whether [the employer] discriminated against [the plaintiff] must be decided solely with respect to the reason given for his discharge. . . . His resume fraud is, for this purpose, irrelevant.

Id. at 1319. The court noted in dicta that such evidence would be relevant at the remedies stage, however, because "it would hardly make sense to order [the plaintiff] reinstated to a job which he lied to get and from which he properly could be discharged for that lie." *Id.* at 1319 n.2.

But subsequent cases in the Seventh Circuit leave that courts' approach the most unsettled, as panel after panel seems at sea without seriously heeding what bearings have been set before. *See Gilty v. Village of Oak Park*, 919 F.2d 1247, 1251 (7th Cir. 1990) (not referencing *Smith* but holding that evidence of the plaintiff's fabrications exposed three years after the adverse employment decision would bar all liability); *Washington v. Lake County, Ill.*, 969 F.2d 250, 253 & n.2 (7th Cir. 1992) (same, but noting that the plaintiff had not challenged the validity of the *Summers* rationale, and that he had not advanced the argument that he should at least, in accordance with the dicta in *Smith*, be accorded partial backpay); *Reed*, 971 F.2d at 1298 (approving *Summers* but giving it a restrained reading); *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364,

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relief available to the plaintiff.[12] The court having had the benefit of the Supreme Court's exposition in *Price Waterhouse* (applying the *Mt. Healthy* framework to Title VII and clarifying the question of timing in mixed motives cases, *see supra* at 8-10 n.6, criticized the *Summers* decision for misapplying *Mt. Healthy*, "in that the *Summers* rule ignores the lapse of time between the employment decision and the discovery of a legitimate motive for that decision." *Id.* at 1179-80. In doing so, the court continued, "the *Summers* rule clashes with the *Mt. Healthy* principle . . . that the plaintiff should be left in no worse a position than if she had not been a member of a protected class or engaged in protected opposition to an unlawful employment practice." *Id.* at 1179.

The Eleventh Circuit was also persuaded that the *Summers* rule would result in underenforcement of the federal anti-employment discrimination laws and accordingly underdeter unlawful employment discrimination. *See id.* at 1179-80. Having resolved that after-acquired evidence does not preclude liability,

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369, 370 (7th Cir. 1993) (departing from the reasoning of *Washington and Reed* without citing them, returning to *Smith* for the proposition that "the only issue is the lawfulness of the termination *for the reasons given*," and holding that "[a] discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge"). Thus, while not exactly clear, the Seventh Circuit, after bouncing back and forth between the two camps for a while, seems now to have settled alongside *Wallace*. *See Kristufek, supra.*

[12]In *Wallace*, the plaintiff (Neil) had filed numerous causes of action against the employer under the Equal Pay Act and Title VII for wrongful discharge. During her deposition, Nell admitted having falsified her employment application by omitting a conviction on drug charges. Soon thereafter, the employer Dunn filed a motion for summary judgment, partially grounded in the *Summers* defense. *See id.*, 968 F.2d at 1176-77.

the court concluded with a detailed exposition on the availability of the standard remedies in after-acquired evidence cases.[13]

III. OUR APPROACH

A. The Liability Stage

1. After-Acquired Evidence Is Irrelevant at the Liability Stage

A quick review of the overarching framework erected for employment discrimination claims, *see supra* at 8-10 n.6, discloses why after-acquired evidence cannot be a defense to liability. What sets an after-acquired evidence case far apart from a mixed-motives case like *Price Waterhouse* or a pretext case like *McDonnell Douglas* is that the articulated "legitimate" reason, which was non-existent at the time of the adverse decision, could

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[13]With respect to reinstatement and front pay, the court held that those remedies would be inappropriate if the after-acquired evidence would have in and of itself led to the adverse employment action. *See id.* at 1181-82. An injunction against an employer's unlawful practices, it added, would not be available if the court did not also order the plaintiff reinstated. *See id.* at 1182. The court also determined, however, that after-acquired evidence would not affect the availability of declaratory relief. *See id.*

According to the court, backpay should be awarded up until the date of *judgment*, unless the employer can prove that "it would have discovered the after-acquired evidence prior to what would otherwise be the end of the backpay period in the absence of the allegedly unlawful acts and this litigation." *Id.* This division, the court explained, would fairly balance the employer's right to make lawful employment decisions and the employee's right to make-whole relief. Ending the backpay period when the employer actually discovered the evidence would not make the victim whole, the court maintained, insofar as absent the unlawful conduct and the resulting litigation, the employer would very likely not have detected the fraud or misconduct. *See id.*

Finally, with regard to the award of attorneys' fees, the court held that if the employee obtained "some benefit" from the lawsuit or if the litigation "materially altered" the parties' legal relationship, she would as a "prevailing party" be entitled to partial attorneys' fees; the after-acquired evidence could diminish the award by an amount arrived at using "traditional attorney fee principles." *See id.* at 1182-83.

not possibly have motivated the employer to the slightest degree. After-acquired evidence, simply put, is not relevant in establishing liability under Title VII or ADEA because the sole question to be answered at that stage is whether the employer discriminated against the employee on the basis of an impermissible factor at the instant of the adverse employment action. *See Wallace*, 968 F.2d at 1179 (pointing out that "the *Summers* rule ignores the lapse of time between the employment decision and the discovery of a legitimate motive for that decision").

The Supreme Court in *Price Waterhouse* held that in a mixed-motives case the employer could rely only on a legitimate motive it held *at the time of the adverse employment decision*. *See* 490 U.S. at 252, 109 S. Ct. at 1791 (plurality) ("An employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it *at the time of the decision*." (emphasis supplied)); *id.* at 250, 109 S. Ct. at 1790 (plurality) (requiring the employer's legitimate, sufficient reason to have motivated the employer "at the moment of the decision"); *id.* at 241, 109 S. Ct. at 1785 (plurality) ("The critical inquiry . . . is whether [a protected characteristic] was a factor in the employment decision *at the moment it was made*." (emphasis in original)); *id.* at 259, 109 S. Ct. at 1795 (White, J., concurring) (stating that the employee must "show that the unlawful motive was a *substantial* factor in the adverse employment action" (emphasis in original)); *id.* at 266-67, 109 S. Ct. at 1799 (O'Connor, J., concurring) (stating that the employer must show that "despite consideration of illegitimate factors the individual plaintiff would not have been hired or promoted in any event").

Thus, under the mixed-motives analysis, the employer in an after-acquired evidence case cannot contend that it would have reached the same decision *at the time* it was made absent the illicit motive. Concomitantly, under the pretext analysis, it

should be simple for the employee to demonstrate beyond preadventure that the proffered legitimate (but after-acquired) reason was not the true cause for the decision but is merely a "pretext." *See, e.g., Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 626 (11th Cir. 1983) (holding that the employer's proffered non-discriminatory reason was pretextual because the employer was unaware of the proffered reason at the time it made its decision), *cert. denied*, 465 U.S. 1066, 104 S. Ct. 1415 (1984); *cf. McDonnell Douglas*, 411 U.S. at 802, 805, 93 S. Ct. at 1824, 1826 (assuming that the employer was aware of the proffered reason at the time of the decision). Although *Summers* reasoned not that the after-acquired evidence would avoid liability but instead that it would bar all remedies, the effect is the same, and therefore the *Summers* rationale entirely eviscerates the temporal holding in *Price Waterhouse* that an employer can rely on a non-discriminatory justification for its action only if that justification actually motivated it at the time of its decision.

Having undermined the defendant's articulated legitimate explanation, under the standard employment discrimination burden-shifting scheme it would now be up to the factfinder to determine if the plaintiff met his or her burden of proving intentional discrimination. By removing this basic issue from the factfinder, courts applying the after-acquired evidence doctrine depart from the settled framework. Problematically, courts that allow after-acquired evidence to bar liability allow employers to make plaintiffs worse off for having a protected characteristic. That is because presumably, absent the wrong done the employee, the employer would not have discovered the "legitimate motive" evidence (at least during the relevant time frame) and the employee would still be employed. *See Wallace*, 968 F.2d at 1179 (observing that the *Summers* rule "excuses all liability based on what *hypothetically* would have occurred absent the alleged discriminatory motive assuming the employer had

knowledge that it would not acquire until sometime during the litigation arising from the discharge" (some emphasis omitted)).

To assure that the plaintiff is restored to the position he or she would have occupied absent the employer's unlawful discrimination, when the employer's motive was exclusively discriminatory at the time of the decision (as is assumed *arguendo* in the *Summers*-type cases), a legitimate reason for the decision brought out later must not be used ***nunc pro tunc*** by the employer to justify its actions. *See Welch*, 23 F.3d at ___ WL at *4 (Arnold, J., dissenting) ("I think that the objects of deterrence and compensation both require us to examine a defendent's mind for what it contained, not what it might have contained, to determine whether he has committed a wrong."). An employer's (assumed) discrimination is a deplorable wrong, and the fact that the employer might have accomplished a like result without maltreating the employee by employing different, nonharmful means (from the point of view of federal law)—that is, by relying on legitimate instead of discriminatory reasons—is beside the point, since if only it had used the other, defensible means there would have been no injury and no cause for the lawsuit.

2. *Victims of Invidious Employment Discrimination Have Standing*

Some members of the no-liability camp advance the rationale that the plaintiff lacks standing because he or she was not qualified for the position (qualification being an element of the plaintiff's *McDonnell Douglas* prima facie case), an argument pertaining to the employer's de jure, as opposed to *Summer's* de

facto, non-liability. *See Dotson*, 977 F.2d at 977-78; *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1251 (7th Cir. 1990).[14] That argument, however, is at odds with Supreme Court precedent.

The plaintiff's *McDonnell Douglas* prima facie case was formulated to identify circumstances under which the discriminatory motive or intent of the employer may be inferred. *See Hicks*, 113 S. Ct. at 2747 (describing that the plaintiff's prima facie case gives rise to a presumption of discriminatory intent, which the defendant must rebut with evidence of a legitimate reason); *Burdine*, 450 U.S. at 253-54, 101 S. Ct. at 1094 (explaining that the plaintiff's prima facie case must "give rise to an inference of unlawful discrimination"); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576-77, 98 S. Ct. 2943, 2949-50 (1978) ("A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."); *Teamsters*, 431 U.S. at 358, 97 S. Ct. at 1866. This reading is substantiated by the fact that the pliant *McDonnell Douglas* prima facie case is only one of many alternative routes available for a plaintiff to travel, amongst which is direct evidence bearing on discriminatory intent. *See, e.g., United States Postal Serv. v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482 (1978).[15] Consequently, what is

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[14]*Cf. Williams v. Boorstin*, 663 F.2d 109, 115-18 (D.C. Cir. 1980) (reaching the same conclusion as *Dotson* and *Gilty* that the plaintiff could not establish a prima facie case because he was unqualified, but there the employer had discovered the employee "lawyer" lacked a law degree *before* discharging him), *cert. denied*, 451 U.S. 985, 101 S. Ct. 2319 (1981); *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985) (holding that the district court did not abuse its discretion in allowing the defendant to introduce after-acquired evidence to rebut the plaintiff's prima facie case of qualification, but cautioning that it would be improper for the employer to use such evidence to justify its decision).

[15]Even were the *Dotson and Gilty* "no standing" rationale persuasive in *McDonnell Douglas* type cases, it could not help the employer in cases (such as this one) where the plaintiff adduces direct evidence of disparate treatment.

relevant to the inquiry is the employer's subjective assessment of the plaintiff's qualifications, not the plaintiff's objective ones if unknown to the employer.[16] In other words, the strength of the inference of discrimination based on the prima facie case is independent of the plaintiff's qualifications that were unknown to the employer.

The no-standing argument additionally runs counter to the plain meaning of Title VII and ADEA. Those statutes grant standing to "any individual" discriminated against by a covered employer. *See* 42 U.S.C.A. § 2000e-2(a) (1981); 29 U.S.C.A.

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[16]Many courts construing Title VII or ADEA have so held. *See, e.g., Kristufek v. Hussman Foodservice Co.*, 985 F.2d 364, 369 (7th Cir. 1993); *Wallace*, 968 F.2d at 1179; *Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 (1989); *Sabree v. United Bhd. of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 402 (1st Cir. 1990); *Hill v. Seaboard C. L. R.R. Co.*, 767 F.2d 771, 774 (11th Cir. 1985), *aff'd on reh'g*, 885 F.2d 804 (11th Cir. 1989); *Cuddy v. Carmen*, 762 F.2d 119, 127 & n.12 (D.C. Cir.), *cert. denied*, 474 U.S. 1034, 106 S. Ct. 597 (1985); *Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 626 (11th Cir. 1983), *cert. denied*, 465 U.S. 1066, 104 S. Ct. 1415 (1984); *Lee v. National Can Corp.*, 699 F.2d 932, 937 (7th Cir.), *cert. denied*, 464 U.S. 845, 104 S. Ct. 148 (1983); *cf. Price Waterhouse*, 490 U.S. at 252, 109 S. Ct. at 1791; *Teamsters*, 431 U.S. at 369 n.53, 97 S. Ct. at 1872 n.53 (illustrating that an employer may rebut a plaintiff's prima facie case by showing that "the nonapplicant's *stated* qualifications were insufficient (emphasis supplied)); *see also Regents of University of Cal. v. Bakke*, 438 U.S. 265, 320 n.54, 98 S. Ct. 2733, 2764 n.54 (1978) ("Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result.").

This temporal knowledge limitation distinguishes a statutory unlawful discrimination claim from a contractual wrongful termination claim. In contract actions, if one party commits a material breach, the other party may generally use it to justify nonperformance even if, at the time of its own nonperformance, the second party was unaware of the first party's material breach. *See College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16, 45 S. Ct. 199, 200-01 (1925); REST.2D CONTRACTS § 385 cmt. *a* (1981); *id.* § 225 & cmt. *e; id.* § 237 & cmt. *c; cf. id.* § 164 (fraudulent inducement makes a contract voidable). In a contract claim, questions like unidentified misrepresentations and the signing of an attestation clause are accordingly important. But in our view it is specious to conflate the two very different causes of action.

§ 623(a) (1985). The result is no different if one focuses on the definition of "employee" rather than "individual," since both statutes define an "employee" as "an individual employed by an employer." 42 U.S.C.A. § 2000e(f) (1981); 29 U.S.C.A. § 630(f) (1985). The point is that neither definition contains an exception for individuals who would not have been employed by the employer but for their fraud or misconduct, or for employees who measured against some objectively defined criteria are "unqualified." Congress having granted standing in the circumstances we consider here, the matter is settled. *See* Kenneth G. Parker, Note, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 428 (1993) ("Simply put, the ability of the plaintiff to sue is delineated by the statute itself, and [the] remedy should be determined with reference to the dual purposes of making the plaintiff whole and deterring a discriminating employer.").

3. Victims of Invidious Employment Discrimination Suffer Real and Legal Injury

Summers understood that "*McDonnell Douglas* clearly presupposes a 'legitimate, nondiscriminatory reason' *known* to the employer at the time of the employee's discharge." 864 F.2d at 705 (emphasis in original). *Summers* reached its conclusion that the employer would not be liable for the different, practical (as opposed to legal) reason that, the plaintiff not having been "injured," he or she could obtain no relief. We disagree.

Reasoning that the plaintiff suffered no legal injury from invidious discrimination when after-acquired evidence reveals resume fraud or work misconduct, *see Summers*, 864 F.2d at 708 (assuming that the employer's decision was motivated by an illegitimate reason); *McKennon*, 9 F.3d at 541, 542 (same); *Milligan-Jensen*, 975 F.2d at 305 (same); *Washington*, 969 F.2d at 255, 256-57 (same); *Johnson*, 955 F.2d at 415 (same), defies

common sense. Imagine, for instance, an employer which intentionally batters an employee who procured his or her position through fraud or who falsified company records. The *Summers* rationale would bar the employee's recovery in an appropriate action because the employee had no "right" to be where he or she was at the moment of his or her injury. Surely that result flies in the face of reason and the whole body of tort law.[17] *Accord Welch*, 23 F.3d at WL at *4 (Arnold, J., dissenting).

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[17]In *Baab v. AMR Servs. Corp.*, 811 F. Supp, 1246 (N.D. Ohio 1993), the court concluded in context of an intentional-infliction of emotional distress claim tacked on to an employment discrimination suit that

> one could take the view that plaintiff should not complain of injury inflicted upon her at her workplace when, had the defendant been apprised of her wrongdoing, she would not have been there in the first place. This argument . . . misses the mark. The injury complained of here is injury to one's person and plaintiff is entitled to be free of that injury regardless of her status as a dischargeable employee.

Id. at 1262. *But cf. Russell v. Microdyne Corp.*, 830 F. Supp. 305, 306-08 (E.D. Va. 1993) (supplanting the *Summers* rationale to sexual harassment situations); *Churchman v. Pinkerton's Inc.*, 756 F. Supp. 515, 518-21 (D. Kan. 1991) (same); *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991, 994-95 (D. Kan. 1989) (same).

Indeed, even one whom the defendant knows to be a wrongdoer at the time of the defendant's actions is not too unworthy in the eyes of the law to recover for an unprivileged intentional *or even a negligent tort. See* REST.2D TORTS § 889 & cmts. *a, b* (1979) ("One is not barred from recovery for an interference with his legally protected interests merely because at the time of the interference he was committing a tort or a crime . . . ."); *id.* § 890 (discussing privileges); *cf id.* § 870 & cmt. *e* (1979) ("One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not [privileged].").

Certainly, the defendant who does not know that the victim is a wrongdoer at the time the tort is committed has no privilege to inflict the harm. And it would seem that if one has no privilege—because there is missing some provocation or circumstance establishing the privileges of self-defense, defense of property, or defense of others—to injure a known trespasser deliberately, *a fortiori* one has no such privilege with respect to someone invited onto the premises, albeit the invitation be procured through trick.

The rationale might have a stronger bite to it were the only injury to the victim the adverse employment action *per se*;[18] but, quite to the contrary, in an employment discrimination suit the traumatic injury is having been subjected to the adverse employment action because of one's race, sex, age, or other protected characteristic, that is, having been unlawfully discriminated against. Put more dramatically, to maintain that a victim of employment discrimination has suffered no injury is to deprecate the federal right transgressed and to heap insult ("You had it coming") upon injury. *Cf.* Richard Granofsky & Jay S. Becker, *After-Acquired Evidence in Employment Discrimination Cases*, 36 DEF. 19, 24 (1994) (referring to such employees as "unworthy"). A victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw.[19] *See* H.R. REP. No. 40(I), 102d Cong., 1st

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[18]Although even were that the case an argument can be made that the plaintiff was still legally injured since, absent the discrimination, he or she would still have been employed and the employer presumably would not have exposed the fraud or misconduct for some unknown span of time. *See Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 322 (D.N.J. 1993) ("Absent those illegal motives, the employee would still be employed. Thus, an illegal discharge causes an injury regardless of an employee's previous misconduct, and that injury must be subject to some redress.").

[19]*See United States v. Burke*, 112 S. Ct. 1867, 1872 (1992) ("It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is, as . . . this Court consistently has held, an invidious practice that causes grave harm to its victims."); H.R REP. NO. 40(I), 102d Cong., 1st Sess. 14 (1991) ("Victims of *intentional* discrimination often endure terrible humiliation, pain and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems."), *reprinted in* 1991 U.S.C.C.A.N. 549, 552; *id.* at 66-69 (documenting the disastrous effects of invidious discrimination on its victims), *reprinted in* 1991 U.S.C.C.A.N. at 604-07; Pauline Yoo, Note, *The After-Acquired Evidence Doctrine*, 25 COLUM. HUM. RTS. L. REV. 219, 252 & n.201 (1993) ("Discrimination can damage a victim emotionally, psychologically, or physically."); *id.* at 243 & n.150 (same); Cheryl K. Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The*

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Sess. 15 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 553 ("The Committee intends to confirm that the principle of anti-discrimination is as important as the principle that prohibits assaults, batteries and other intentional injuries to people.").

In the 1991 Act, Congress understood as much and changed the result reached in *Price Waterhouse*: in cases decided under the 1991 Act, the plaintiff is entitled to some relief even if the employer actually would have taken the same action at the same time absent any invidious motive. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075-76 (codified at 42 U.S.C.A. §§ 2000e-2(m), 2000e-5(g)(2)(B) (Supp. 1994)).

Moreover, we think it clear that, where a federal right has been violated, federal courts must provide a remedy. The right which is violated by an employer which discriminates on the basis of a protected characteristic is not the employee's right to the job, but the employee's right to equal, fair, and impartial treatment, the violation of which frequently results, *inter alia*, in a significant injury to the victim's dignity and a demoralizing impairment of his or her self-esteem. *See supra* at 23 n.19; *cf.* H.R. REP. NO. 40(I) at 64-65, *reprinted in* 1991 U.S.C.C.A.N. at 602-03; *Brown v. Board of Educ.*, 347 U.S. 483, 494, 74 S. Ct., 686, 691-92 (1954); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072-73 (codified at 42 U.S.C.A. § 1981a(b)(3) (Supp. 1994) (providing a plaintiff may recover compensatory damages under Title VII for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life,

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Privatization of Title VII and the Contours of Social Responsibility, 46 STAN. L. REV. 175, 199-200 (1993) [hereinafter Zemelman, *The After-Acquired Evidence Defense*]; *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(b), 105 Stat. 1075-76 (codified at 42 U.S.C.A. § 2000e-5(g)(2)(B) (Supp. 1994)) (allowing a court to grant a victim in a mixed-motives case declaratory and injunctive relief and to award him or her attorneys' fees and costs even if the employer had a legitimate, sufficient motive when it acted).

and other nonpecuniary losses''). The plaintiff's deceit or misconduct toward the employer is most appropriately considered in the remedies stage, or in any claim compatible with the federal anti-discrimination laws that the employer may properly assert against the employee under appropriate state or federal law. *See Massey*, 828 F. Supp. at 323 (''[I]f the employer has somehow been damaged by the plaintiff's misrepresentations or misconduct on the job, it may seek its own damages where appropriate.'').

The *Summers* rationale confuses the question whether the employer injuriously discriminated against the employee with the question whether the employee had an entitlement to the job. Whether the employee had some ''right'' to the job in question is not an issue in a Title VII or ADEA action; the issue is whether the employer discriminated based on an impermissible factor. Besides receiving no mention in the statutes, the ''property right'' inquiry is irrelevant for the simple reason that both Title VII and ADEA operate against the presumed backdrop of at-will employment, meaning that the employee is presumptively *not* entitled to the job, irrespective of resume fraud or performance misconduct. Under the traditional employment-at-will doctrine, an employer may discipline or terminate an employee for *any* reason or *no* reason.[20] Thus, if entitlement to the job were

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[20]*See, e.g., Poff v. Western Nat'l Mut. Ins. Co.*, 13 F.3d 1189, 1191 (8th Cir. 1994) (Minnesota law); *Richards v. General Motors Corp.*, 991 F.2d 1227, 1234-35 (6th Cir. 1993) (Michigan law); *Hall v. Western Prod. Co.*, 988 F.2d 1050, 1058-59 (10th Cir. 1993) (Wyoming law); *Carlson v. Arnot-Ogden Memorial Hosp.*, 918 F.2d 411, 414 (3d Cir. 1990) (Pennsylvania law).

While the federal anti-employment discrimination laws were not designed to impinge directly upon employer free choice, indirect effects are inevitable. No doubt the federal employment discrimination laws have curtailed the more excessive aspects of the employment-at-will doctrine with respect to protected persons. Now, a covered employer who arbitrarily and capriciously terminates a protected person without any animus toward the protected characteristic runs

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a prerequisite to liability or recovery, then *no* at-will employee could recover under Title VII or ADEA—but that plainly is not the case. *See Washington*, 969 F.2d at 256 ("A 'property right' in one's job . . . is not a requirement in a federal discrimination claim.").

What *is* the case is that neither Title VII nor ADEA strips a wrongdoing employee of his or her entitlement to protection against unlawful discrimination. Instead of focusing on the worthiness of the victim, the statutes exclusively and unambiguously fix on the employer's motives. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, 94 S. Ct. 1011, 1021 (1974) ("Title VII's strictures are absolute and represent a congressional command that *each* employee be free of discrimination." (emphasis supplied)); *Massey*, 828 F. Supp. at 323 ("There is nothing in [Title VII] itself to support a requirement that the job had been acquired honestly."). An employee's fraud or misconduct, while bearing on his or her fitness for the job, simply does not justify, excuse, or make harmless the employer's intentional, invidious discrimination. Because the *Summers* approach ignores these precepts, thereby denying remedial justice for a grievous injury, we reject that approach.

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a not insubstantial risk of liability. For example, the Supreme Court has intimated that an arbitrary and capricious rationale may not meet the employer's burden of rebutting a plaintiff's prima facie case of discrimination. *See Burdine*, 450 U.S. at 255, 101 S. Ct. at 1094 ("The [legitimate] explanation [the defendant] provided must be legally sufficient to justify a judgment for the defendant."); *McDonnell Douglas*, 411 U.S. at 802-03, 93 S. Ct. at 1824 ("We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire."). Nevertheless, the employment-at-will doctrine has been abridged only to the extent necessary to enforce the federal employment discrimination laws.

4. *Summers Ignores the Compelling Public Interest in Enforcement*

Besides slighting the very real injury suffered by a victim of employment discrimination, the *Summers* rule disregards that an act of employment discrimination is much more than an ordinary font of tort law. The anti-employment discrimination laws are suffused with a public aura for reasons that are well known. Throughout this Nation's history, persons have far too often been judged not by their individual merit, but by the fortuity of their race, the color of their skin, the sex or year of their birth, the nation of their origin, or the religion of their conscientious choosing. Congress has responded to these pernicious misconceptions and ignoble hatreds with humanitarian laws formulated to wipe out the iniquity of discrimination in employment, not merely to recompense the individuals so harmed but principally to deter future violations.

The anti-employment discrimination laws Congress enacted consequently resonate with a forceful public policy vilifying discrimination.[21] A plaintiff in an employment-discrimination case

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[21] *See. e.g., Aikens,* 460 U.S. at 716, 103 S. Ct. at 1482 ("The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy."); *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 778 n.40, 96 S. Ct. 1251, 1271 n.40 (1976) (stating that "claims under Title VII involve the vindication of a major public interest" (internal quotations omitted)); *id.* at 763, 96 S. Ct. at 1263 ("[Congress] ordained that its policy of outlawing [discrimination on the basis of race, religion, sex, or national origin]should have the 'highest priority' . . . ."); *Alexander,* 415 U.S. at 45, 94 S.Ct. at 1018 ("[T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."); *cf. Newman v. Piggie Park Enters.,* 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968) (per curiam) (decided under Title II of the Civil Rights Act of 1964) (stating that Congress intended the struggle against discrimination to be a policy "of the highest priority").

accordingly acts not only to vindicate his or her personal interests in being made whole, but also as a "private attorney general" to enforce the paramount public interest in eradicating invidious discrimination.[22]

In sum, it appears that the employee's misconduct or fraud is a possible wrong against the employer, whereas the employer's discrimination is a wrong against the employee *and* society at large. *See Massey*, 828 F. Supp. at 323 ("Any concern we may have in awarding damages to employees who have acquired their jobs improperly does not outweigh the plaintiff's statutory right to recover . . . ."). The *Summers* approach unjustifiably exalts the employer's purely private state right above the employee's quasi-public federal one.

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[22]*See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602, 101 S. Ct. 817, 824 (1981) ("Congress considered the charging party a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the [Equal Employment Opportunity] Commission itself." (*citing Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 700 (1978)); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S. Ct. 2024, 2030-31 (1980); *Albemarle Paper Co. v. Moody* 422 U.S. 405, 415, 95 S. Ct. 2362, 2370 (1975); *Alexander*, 415 U.S. at 45, 94 S. Ct. at 1018; *see also Newman*, 390 U.S. at 401-02, 88 S. Ct. at 966 (decided under Title II of the Civil Rights Act of 1964).

In the Civil Rights Act of 1991, by authorizing a court to grant a victim of discrimination in a mixed-motives case declaratory and injunctive relief and partial attorneys' fees and costs, Congress again recognized the public interest in eradicating discrimination even when the employer had acted at the time of its decision for a legitimate reason that would have propelled it to take the same actions standing alone. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(b), 105 Stat. 1075-76 (codified at 42 U.S.C.A. § 2000e-5(g)(2)(B) (Supp. 1994)). That is, the 1991 Act reinforces the common sense notion that, even if the plaintiff is entitled to no personal relief, at least the remedies inuring to the public's benefit—a declaratory judgment, injunctive relief, and, derivatively, attorneys' fees, *see supra* (discussing the litigant's role as a private attorney general)—should be considered in an after-acquired evidence case. Since those remedies do not economically benefit the plaintiff, that provision evidences a strong public policy in favor of enforcement of the anti-employment discrimination laws.

5. Non-Liability Undermines the Statutes' Purposes

As described *supra* Part III.A.4, Congress prescribed a strong medicine, the anti-employment discrimination laws, to cure the social malady of invidious discrimination. Deterrence is accomplished by placing an economic price on discriminatory acts, and by exposing and stigmatizing the wrongdoer's acts before the entire community. We also bear in mind that, as remedial statutes, Title VII and ADEA should be liberally construed to advance their beneficent purposes.[23] Unfortunately, the *Summers* approach disregards that canon of construction and frustrates the paramount objective of Title VII and ADEA, to deter violations of the law.[24] *See Wallace*, 968 F.2d at 1180-81; *cf. Price Waterhouse*, 490 U.S. at 265, 109 S. Ct. at 1798

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[23]*See, e.g., Hart v. J. T. Baker Chem. Co.*, 598 F.2d 829, 831 (3d Cir. 1979) (Title VII); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765-66, 99 S. Ct. 2066, 2076 (1979) (Blackmun, J. concurring) (ADEA); *Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221, 1229 (3d Cir. 1978) (in banc) (same); *cf., e.g., Dennis v. Higgins*, 498 U.S. 439, 443, 111 S. Ct. 865, 868 (1991) (section 1983).

One overriding lesson the 1991 Act tutors all but its most unmindful reader is that Congress was unhappy with increasingly parsimonious constructions of Title VII. Essentially, Congress forcefully reminded courts of the canon that Title VII and ADEA, as remedial statutes, are to be construed liberally to promote their welfare purposes, equality of treatment and employment opportunities.

[24]"The 'primary objective' of Title VII is to bring employment discrimination to an end." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228, 102 S. Ct. 3057, 3063 (1982) (citing *Albermarle Paper*, 422 U.S. at 417, 95 S.Ct. at 2371); *see* 28 U.S.C.A. § 621(b) (1985) (listing the purposes of ADEA, including "to prohibit arbitrary age discrimination in employment"); *Zinger v. Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977) ("The primary purpose behind [ADEA] is to prevent age discrimination in hiring and discharging workers."), *cert. denied*, 434 U.S. 1008, 98 S. Ct. 717 (1978). Compensating victims to make them whole, while also of great weight, is a secondary objective. *See Albemarle Paper*, 422 U.S. at 417-18, 95 S. Ct. at 2371-72; *cf. Teamsters*, 431 U.S. at 364, 97 S. Ct. at 1869 (stating that the deterrence and compensatory purposes are "equally important").

(O'Connor, J., concurring) (stating that if "an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of [Title VII] has clearly been triggered." (emphasis in original)).

A strong deterrence policy is the needed stimulus to propel otherwise indifferent employers into taking affirmative steps to educate and discipline members of their workforce insensitive to or disdainful of their co-workers' civil rights. Economic penalties work as reliable engines to drive home forcefully to rational employers the seriousness and solemnity of our national policy denouncing discrimination, and thereby inspire affirmative responses. *See Albemarle Paper*, 422 U.S. at 417-18, 95 S. Ct. at 2371-72 ("It is the reasonably certain prospect of a backpay award that provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." (internal quotations omitted)); *cf. Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1506 & n.35 (1994) (recognizing that liability impacts "private parties' planning"); *City of Riverside v. Rivera*, 477 U.S. 561, 575, 106 S. Ct. 2686, 2694 (1986) (plurality) (section 1983) (stating that "the damages a plaintiff recovers contribute significantly to the deterrence of civil rights violations in the future").[25]

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[25]On the other hand, allowing employees or applicants who committed fraud or misbehaved on the job to prevail will not notably diminish their disincentive to wrong or deceive their employers or their prospective employers. It seems unreasonable to attribute to the wrongdoing employee or applicant the strategy to lie to or cheat his or her employer or prospective employer with the expectation that, if the employer unlawfully discriminates against him or her, it will not be able to use that wrongful conduct against him or her if discovered in the course of the resulting proceedings. *See Massey*, 828 F. Supp. at 322 n.10 ("We find it preposterous that an employee would refrain from lying [on a resume or employment application] because she anticipates that she may be

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Of course, the efficacy of the after-acquired evidence tactic has not escaped the attention of defense counsel, some of whom have recommended that, to maximize a client's odds of success, defense counsel's first step when defending an employment discrimination claim should be thoroughly to investigate the plaintiff's background and job performance. Indeed, many have instructed employers on specific policies they can implement to erect the strongest possible defense in employment discrimination suits, and, if recognized, one can anticipate the extensive and effective use of the after-acquired evidence doctrine.[26] The

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illegally discriminated against later and wants to preserve her right to recover damages."). Applicants misrepresent their qualifications in order to secure the employment in the first place, a powerful incentive that will not be curtailed by the unlikely prospect, of which the great bulk of applicants and employees will be unaware, that the employer may discover the falsehood in an employment discrimination action and will be able to exploit it to bar the employee's or applicant's claim. The applicant's incentive not to be dishonest, and the employee's incentive not to breach his or her duties of truthfulness, loyalty, and obedience, stem from the fact that he or she is always subject to disciplinary measures if the employer learns of the wrong outside the context of discovery in an employment discrimination case. The only applicant or employee incentive that will wane if after-acquired evidence is allowed to bar all liability is the plaintiff's vindication of his or her federal rights when he or she is unlawfully discriminated against, even where the discrimination is ongoing, especially since any attorney the plaintiff might consult would presumably become aware of the rule.

We note in passing that many employers in fact responsibly investigate applicants across-the-board before hiring someone, and that the employer's need for truthful employment applications has been sharpened with the spread of employer liability for "negligent hiring." An employment-discrimination suit brought by a discharged employee or unsuccessful applicant, however, does not provide a sound business (as opposed to litigation) reason for the employer to begin investigating its ex-employee's or applicant's honesty and fidelity.

[26]See James A. Burstein & Steven L. Hamann, *Better Late Than Never—After-Acquired Evidence in Employment Discrimination Cases*, 19 EMPLOYEE REL L.J. 193, 202-03 (1993) ("[A]fter-acquired evidence should be factored in crafting personnel policies. Foremost among the considerations is to ensure that

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prospect of a defendant's thorough inquiry into the details of a plaintiff's pre- and post-hiring conduct, however, may chill the enthusiasm and frequency with which employment discrimination claims are pursued, even in cases where the victim of discrimination has nothing to hide, let alone cases where the potential plaintiff is not entirely blameless.[27] Placed in context of the

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applications and employee manuals expressly state that resume fraud or application misrepresentations will result in suspension pending discharge. . . . Second, a prompt and thorough investigation of a complaint's discrimination charge should be conducted."); David D. Kadue & William J. Dritsas, *The Use of After-Acquired Evidence in Employee Misconduct and Resume Fraud Cases*, 1993 LAB. L.J. 531, 531 [hereinafter Kadue & Dritsas, *The Use of After-Acquired Evidence*] (stating that when an employee sues for employment discrimination, commonly "the employer investigates the former employee's background with special care"); George D. Mesritz, *"After-Acquired" Evidence of Pre-Employment Representations: An Effective Defense Against Wrongful Discharge Claims*, 18 EMPLOYEE REL. L.J. 215, 215, 222-25 (1992) ("Management should respond to this favorable development [— the judicial recognition of the after-acquired evidence doctrine —] by routinely searching for pre-employment misrepresentations as a potential defense in all discharge litigation. Employers in turn should maximize the probability that 'after-acquired' evidence is available as a defense by revising employment applications to elicit even more specific information."); Robert M. Shea, *Post-termination Discovery of Employee Misconduct: A New Defense in Employment Discrimination Litigation*, 17 EMPLOYEE REL. L.J. 103, 103-04, 109 (1991) [hereinafter Shea, Posttermination Discovery of Employee Misconduct] (explaining that *Summers* "gives employers a legal basis and, more importantly, a good reason for taking a broader approach to discovery in employment discrimination litigation" and advising employers to "scrutinize representations made by the plaintiff during the hiring process" and to look for "previously undiscovered misconduct"); William S. Waldo & Rosemary A. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered After an Employee's Discharge to Bar Discrimination Claims*, 9 LAB. LAW. 31, 32, 40-42 (1993) (advising defense counsel to "leave no stone unturned in ferreting out any evidence" of resume fraud or employment misconduct by conducting "a thorough post-termination investigation").

[27] *See Massey*, 828 F. Supp. at 323 (reasoning that "the use of after acquired evidence to bar a discrimination claim in its entirety could cause

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general pervasiveness of resume fraud and employee misconduct,[28] the likely consequence of the widespread exploitation of after-acquired evidence will be underenforcement of Title VII and ADEA, and consequently underdeterrence of discriminatory employment practices.[29]

This leads us to a final reason why liability is proper in a Title VII or ADEA after-acquired evidence case, namely, the other paramount objective of those statutes "'to make persons

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employees who did something wrong in the past to quietly endure discriminatory treatment rather than complain, regardless of how long ago the misconduct occurred or its triviality"). Moreover, the inevitable "fishing expeditions[ ] ... for 'minor, trivial or technical infractions,'" *Washington*, 969 F.2d at 256 (quoting *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656 (D. Utah 1990)), might curtail the success of victims of employment discrimination in bringing lawsuits and thereby erode the effectiveness of Title VII and ADEA. *See, e.g., McKennon*, 9 F.3d at 540-41 & nn.1 & 3 (describing the employer's masterful use of after-acquired evidence).

[28]By all accounts, resume fraud is a serious and recurrent problem facing employers. *See, e.g.*, Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employee['s] Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 1 n.2 (1990); Shea, *Post-termination Discovery of Employee Misconduct*, 17 EMPLOYEE REL. L.J. at 403 n.3; Zemelman, *The After-Acquired Evidence Defense*, 46 STAN. L. REV. at 176 n.5; *see also* Douglas L. Williams & Julia A. Davis, *Title VII Update — Skeletons and a Double-Edged Sword*, C669 A.L.I.-A.B.A. 303, 305 (1991) ("At one time or another probably every employee commits an infraction at work and hopes that the boss never finds out.").

[29]Some courts have tried to deal with the problem of underenforcement by requiring the fraud or misconduct to be material before accepting the employer's defense, *see, e.g., O'Driscoll*, 12 F.3d at 180, but the meaning of materiality has not been settled. For example, at least one court confronted with a boilerplate attestation clause in an employment application has held that the misrepresentation itself, whether material or not standing alone, became material by virtue of the clause, rendering the materiality requirement largely meaningless. *See Milligan-Jensen*, 975 F.2d at 303-04 & nn. 1 and 2; *cf. Johnson*, 955 F.2d at 414 (holding that an employer's asserted actual reliance upon the plaintiff's misrepresentation made it material as a matter of law); *Gilty*, 919 F.2d at 1251 (holding that a plaintiff's misrepresentation *ipso facto* rendered him unqualified for the job).

whole for injuries suffered on account of unlawful employment discrimination.'" *Franks*, 424 U.S. at 763, 96 S. Ct. at 1264 (quoting *Albemarle Paper*, 422 U.S. at 418, 95 S. Ct. at 2372); *see id.* at 764, 96 S. Ct. at 1264 (stating that the plaintiff should be made "whole insofar as possible"); *see Albemarle Paper*, 422 U.S. at 418-21, 95 S. Ct. at 2372-73; *supra* at 28 n.24. Of course, the corollary to the make-whole directive is that the protected employee is not to be catapulted into a better position than he or she would have enjoyed had the employer not acted unlawfully. *See Burdine*, 450 U.S. at 259, 101 S. Ct. at 1096 ("Title VII . . . does not demand that an employer give preferential treatment to minorities or women."); *cf. Mt. Healthy*, 429 U.S. at 285-86, 97 S. Ct. at 575.

Keeping in mind the aspiration, then, that the plaintiff should be left in the same position as he or she was in before the discrimination, the bottom line is straightforward. On the one hand, holding the employer liable and providing the victim appropriately fashioned remedies would restore the victim to his or her prior position, not a better one than had he or she not suffered from unlawful discrimination. On the other hand, barring all remedies would leave the victim in a *worse* position than had the employer not unlawfully discriminated against him or her (in which case the employee assumedly would still be employed), and elevates the employer to a superior position insofar as it lets the employer get off scot-free despite its blameworthy conduct. These two observations hold true especially in instances where the employer's discovery of the after-acquired evidence was brought about due to the legal proceedings instituted in response to the employer's wrongful acts, since in those cases, absent the discrimination, the employer may never have discovered the evidence (or at least not until some indeterminate future time). *See Wallace*, 968 F.2d at 1179-80; *Welch*, 23 F.3d at WL at *3

(Arnold, J., dissenting);[30] *cf. John Cuneo, Inc.*, 298 N.L.R.B. 856, 856 (1990). In short, a major weakness of the *Summers* approach is that it does not restore a victim to the position he or she would have occupied but for the discrimination.

6. Summary

For all the foregoing reasons, we hold that after-acquired evidence is inadmissible, because irrelevant, at the *liability* stage of a cause of action brought under Title VII or ADEA. We do not rule out the potentiality that such evidence may serve as the foundation for a claim of fraud, conversion, or the like by the employer against the plaintiff in an appropriate forum, but only that it may not be introduced substantively for the purpose of defending against liability. We must accordingly reverse the district court's grant of summary judgment to Harleysville and remand for further consideration.

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[30]We think that Judge Arnold got the better of the argument in his dissent in *Welch*:

> I respectfully suggest that the court errs in concluding that if defendant can show that it would never have hired Mr. Welch but for his misrepresentation, then Mr. Welch will be in no worse position than he would have been but for the alleged illegal act. The crucial points are that the defendant did hire him and did not know of the facts that might have led to Mr. Welch's discharge until it discovered them because suit was filed against it. The defendant might never have learned of those facts, or it might have learned of them fortuitously at some later time. Until it did so, those facts could hardly provide an excuse for termination, since they could not have provided any part of the defendant's motive. If Mr. Welch is not compensated for losses suffered between the time he would have been fired on account of the discovery of relevant facts, he is not in the same position he would have been in but for a wrong committed against him, and the purpose of the protective legislation is entirely lost.
>
> . . . The plaintiff does not seek to benefit from his misrepresentation, if any. He seeks simply to have the law applied to him in an evenhanded way.
>
> *Id.* at ___ *3.

B. The Remedies Stage

Because the district court must proceed further with this case and may well have to reach the remedies stage, for the guidance of that court on remand we will make a few comments about the remedies facet of the case. We note in this regard that the questions of how the after-acquired evidence may be used harmoniously with Title VII's and ADEA's language and goals, and of what remedies should inure to a plaintiff in an after-acquired evidence case, seem to be far more stubborn than the liability issue.

First, after-acquired evidence of resume and/or application fraud or employer [sic] misconduct on the job is relevant to at least some issues at the remedies stage (and hence is admissible at that point), even if it has surfaced after the employer's searching inquiry in the aftermath of the employer's unlawful conduct or in the course of its trial preparation.[31] The court should, of

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[31]We observe that in a normal Title VII or ADEA case, evidence acquired *before* the adverse employment decision might, as a prophalactic measure, be inadmissable altogether if the plaintiff could show that the employer had a practice of thoroughly investigating the information provided in employment applications and interviews by, and of comprehensively reviewing on-the-job performance of, only or primarily only the members of a protected class with the motive to discover flaws justifying an adverse employment action, for such a practice would probably contravene Title VII and ADEA. Assuming it were so, since the filing of the lawsuit would appear to be an activity protected to the same extent as membership in another protected class, *see* 42 U.S.C.A. § 2000e-3(a) (1981) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."); 29 U.S.C.A. § 623(d) (1985) (similar), it would seem to follow that the aforementioned defense strategy of investigating employees who file complaints with the intent to discover evidence retroactively justifying or excusing

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course, be cautious lest the remedies evidence affect the liability verdict.

Second, at the remedies stage, the district court must bear in mind Title VII's and ADEA's two principal objects: deterrence and compensation. *See Albemarle Paper*, 422 U.S. at 421, 95 S. Ct. at 2373; *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30, 91 S.Ct. 849, 853 (1971); *supra* at 28 n.24. Congress has from Title VII's inception expected courts to fashion remedies guided by the acts' twin central goals. *See Franks*, 424 U.S. at 763-64, 96 S.Ct. at 1263-64. To advance these goals, a district court is under the " 'duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Franks*, 424 U.S. at 770, 96 S.Ct. at 1267 (quoting *Albemarle Paper*, 422 U.S. at 418, 95 S.Ct. at 2372).[32]

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the adverse employment decision may itself violate Title VII and ADEA, and if so it might be contrary to the design of those statutes to allow the employer to benefit from (introduce) such evidence.

Accordingly, an argument could be made that such evidence should be excluded from consideration as the fruits of unlawful retaliation even in the remedies stage of a Title VII or ADEA suit. That is, if it were the case that the calculated discovery of after-acquired evidence (as opposed to, for example, its inadvertent or independent discovery) amounts to retaliation under Title VII or ADEA, although it is exceedingly unlikely that any economic damages would flow therefrom, it may very well be that any evidence so stated would have to be suppressed at the remedies stage of the proceedings, except perhaps to show that reinstatement would threaten the public health, safety, or welfare, or would otherwise violate a public policy on par with the one antithetical to employment discrimination. This argument, however, was not advanced in this case until oral argument, and we shall decline to further consider it.

[32]The same standard applies under ADEA. As we explained in *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2254 (1978):

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Third, we illustrate these points with respect to the most common remedy, backpay. The Supreme Court has laid down the general rule under Title VII that

> given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

Albemarle Paper, 422 U.S. at 421, 95 S. Ct. at 2373, *quoted in Franks*, 424 U.S. at 771, 96 S. Ct. at 1267. We have applied the same standard to ADEA. *See Rodriguez*, 569 F.2d at 1238 (quoting *Albemarle Paper* as quoted *supra*). But some courts cut backpay off prematurely at the moment the employer obtains the after-acquired evidence. *See, e.g., Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993); *Smith*, 876 F.2d at 1319 n.2 (dicta); *cf. John Cuneo*, 298 N.L.R.B. at 856. This

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> Monetary awards exacted from employers who practice unlawful discrimination serve two primary functions. First, the prospect of economic penalties more certainly deters illegal employment practice[s] than does exposure to injunctive relief or prospective equitable remedies such as reinstatement. Second, economic exactions recompense individuals for injuries inflicted by employers' discriminatory conduct. These prophylactic and compensatory purposes are the basis of most recent anti-employment discrimination legislation, including the ADEA and Title VII. Thus, the Supreme Court's mandate on the exercise of trial court's discretion in granting monetary relief in Title VII suits . . . is equally compelling in the context of ADEA actions . . . .
>
> The make whole standard of relief should be the touchstone for the district courts in fashioning both legal and equitable remedies in age discrimination cases. Victims of discrimination are entitled to be restored to the economic position they would have occupied but for the intervening unlawful conduct of employers.

Id. at 1237-38 (citations omitted).

formula is, however, inconsistent with the effectuation of the statutes' deterrent and compensatory purposes, and we favor the normal rule that, when otherwise appropriate, backpay should be awarded until the date of judgment. *Accord Wallace*, 968 F.2d at 1182; *Massey*, 828 F. Supp. at 232.

We reach this result by considering the statutory policies at stake. Insofar as after-acquired evidence is uncovered during the legal dispute and would not have been discovered, at least for an indeterminate stretch of time, absent the employer's unlawful acts, the plaintiff would be left in a worse position because of the discrimination if the court were to make use of that evidence to limit the victim's remedies, and the make-whole compensatory goal of the acts would not be reached. Confining backpay to the discovery date would also dilute the deterrent effect of Title VII and ADEA, an effect best promoted with an award of backpay, *see supra* (quoting *Albemarle Paper*).

On the other end of the scale weighs the policy of allowing employers free choice (primarily encroached on by reinstatement rather than by an award of backpay), *see, e.g., Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 527 (3d Cir. 1992) (citing cases), and the difficulty in ignoring such evidence insofar as it could be read as condoning the employee's misbehavior, *cf. Summers*, 864 F.2d at 708 ("To argue . . . that this after-acquired evidence should be ignored is utterly unrealistic."). But the fact that courts will not turn a blind eye to employee fraud and misconduct is adequately demonstrated in cases where the employer *in fact* bases its adverse employment decision on the employee's wrongful actions, because then the evidence is fully considered at every stage of the dispute, and also perhaps in context of other remedies (like reinstatement) in after-acquired evidence cases.

There are occasions, of course, when after-acquired evidence is useful in measuring backpay: if the employer can somehow insulate its illegal actions from its discovery of the disfavorable evidence, it is free to act on it (keeping in mind the prohibition against retaliation, *see supra* at 35 n.31) to discipline its employee, as there would be no causation. One example is where the employer would have inevitably discovered the evidence in the normal progression of things (that is, assuming no litigation).[33] Alternatively, the employer may happen upon the evidence completely independently of any investigation prompted by the discriminatory employment action or its aftermath, including the legal proceedings.[34] Proof of either of these occurring would entitle an employer to cut off all further liability from the time the employer can establish with reasonable certainty the date of the inevitable or independent discovery, so long as the employer additionally shows that based upon that evidence it indeed would have taken the same employment action at that time. *See Wallace*, 968 F.2d at 1182 (ending backpay at the earlier of (i) the date of judgment, and (ii) the date the employer can show it would have discovered evidence, independently of the adverse employment decision and the ensuing

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[33]*See, e.g., Rodriguez*, 431 U.S. at 403 n.9, 97 S.Ct. at 1897 n.9 (allowing the company to prove at trial that the applicant "would not have been hired in any event"); *Sabree*, 921 F.2d at 405 (reducing damages if the employer would have inevitably discovered that the plaintiff was ineligible for a transfer); *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 626-27 (4th Cir.) (holding that the plaintiff was not entitled to backpay because the employer would have inevitably discovered his prior misconduct and would not have hired him even had it not discriminated against him), *cert. denied*, 469 U.S. 832, 105 S. Ct. 120 (1984). *But see Summers*, 864 F.2d at 707 n.3 ("[T]he probability that Summers' transgressions would have been discovered in the absence of the trial is immaterial.").

[34]*See Gilty*, 919 F.2d at 1249, 1255-56 (holding that a discharge was not retaliatory because a new police chief independently undertook a comprehensive review of all the city's officers' credentials); *cf. Welch*, 23 F.3d at WL at *3 (Arnold, J., dissenting) (referring to the defendant's "fortuitous" discovery of the evidence).

litigation, which would have led it to take the same adverse action with respect to the employee); *Massey*, 828 F. Supp. at 324 (same).[35]

Fourth, we must stress in terms of policy the importance of the background rule of employer free choice. The federal anti-employment discrimination laws were designed not to impinge directly upon employer free choice; that is not to interfere unnecessarily with legitimate business operations and decisions. *See Burdine*, 450 U.S. at 259, 101 S. Ct. at 1096 ("[Title VII] was not intended to 'diminish traditional management prerogatives.' " (quoting *United Steelworkers v. Weber*, 442 U.S. 193, 207, 99 S.Ct. 2721, 2729 (1979)); *Price Waterhouse*, 490 U.S. at 242, 109 S. Ct. at 1786 (stressing that an "important aspect of [Title VII] is its preservation of an employer's remaining freedom of choice"). For example, the federal employment discrimination laws do not alter the employment-at-will doctrine except in limited respects. *See supra* at 24-26 & n.20. Their goal instead is to restore the victim of the employer's illegal conduct to the position he or she would have occupied absent the discrimination. Thus, where an equitable remedy, such as reinstatement, would be particularly invasive of the employer's "traditional management prerogatives," the after-acquired evidence may bar that remedy. *Cf. supra* at 35 n.31.

For the foregoing reasons, we will vacate the district court's order granting summary judgment to Harleysville, and remand

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[35]For example, if the inevitable or independent discovery would have preceded an applicant's hiring, probably no back pay would be due. *See Smallwood*, 728 F.2d at 626. By contrast, declaratory and injunctive relief as well as attorney's fees, properly apportioned, might still be available. Moreover, in cases governed by the Civil Rights Act of 1991, the plaintiff might also be able to recover compensatory damages and, if the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," punitive damages, *see* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072-73 (codified at 42 U.S.C.A. § 1981a(a)(1), (b)(1) (Supp. 1994)), irrespective of inevitable or independent discovery.

the case to the district court for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NANCY MARDELL, *Plaintiff,* vs. HARLEYSVILLE LIFE INSURANCE COMPANY, *Defendant.*	**Civil Action No. 91-1493**

MEMORANDUM AND ORDER

BARRON P. McCUNE, Senior District Judge
April 27, 1993.

We consider a motion for summary judgment filed by Defendant Harleysville Life Insurance Company ("Harleysville"). Plaintiff Nancy Mardell alleges that she was terminated from her position as Regional Director of Life Insurance for Harleysville in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.S. § 621, et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e), et seq. We have jurisdiction pursuant to 28 U.S.C.S. § 1331. For the reasons discussed below, the motion for summary judgment will be granted.

FACTS

Nancy Mardell applied for the position of Life Manager at Harleysville in December 1987.[1] Ms. Mardell submitted a

[1]According to Harleysville, the job title "Life Manager" was changed to "Regional Director—Life" during Ms. Mardell's tenure with Harleysville.

résumé and completed a job application. Contained on the job application Ms. Mardell signed is the following language:

> "The information provided on this employment application is correct and complete to the best of my knowledge. I realize that falsification and/or incomplete information may jeopardize my employment, now or in the future."

Both Glyn D. Mangum, then vice-president of sales, and William J. Forloine, then vice-president of marketing, interviewed Ms. Mardell. Mr. Forloine communicated to Mr. Mangum his impressions of Ms. Mardell. After considering Ms. Mardell's résumé, job application and personal interview and Mr. Forloine's remarks, Mr. Mangum made the decision to hire Ms. Mardell. Ms. Mardell started work for Harleysville in February 1988.

Mr. Forloine, who became Ms. Mardell's direct supervisor when he became senior vice-president of marketing and sales, made the decision to terminate Ms. Mardell in February 1990 for stated reasons of poor performance. The within wrongful discharge action was filed September 6, 1991.

During the course of discovery, Harleysville learned for the first time that Ms. Mardell had misrepresented herself on her résumé and job application. Harleysville has submitted the affidavits of Messrs. Mangum and Forloine which state that had they known of the alleged misrepresentations prior to hiring Ms. Mardell, they would not have hired her and had the alleged misrepresentations become disclosed during Ms. Mardell's employment with Harleysville, she would have been discharged immediately. According to Harleysville, Ms. Mardell misrepresented on her résumé and job application that she had a college degree when she applied for the position at Harleysville and had had professional experience in various positions for which she had been paid.

DISCUSSION

When there is no issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden is on the moving party to demonstrate that there is no genuine issue of material fact. *Id.* All inferences from the underlying facts are to be viewed in favor of the non-moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Once the moving party has sustained his burden of proof, "the opposing party must introduce specific evidence showing that there is a genuine issue for trial." *Williams v. West Chester*, 891 F.2d 458, 464 (3d Cir. 1989) (citation omitted).

1. The Law

The issue we address is whether after-acquired evidence of Plaintiff's résumé and application fraud precludes Plaintiff from seek seeking relief under Title VII and the ADEA. The appellate courts are split on the issue and it has not been addressed by the Third Circuit Court of Appeals.

The "after-acquired evidence" doctrine was originated by the Tenth Circuit Court of Appeals in *Summers v. State Farm Mutual Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). In *Summers*, Summers alleged he was wrongfully terminated from his position as a field claims representative due to his age and religious beliefs in violation of the Civil Rights Act of 1964 and the ADEA. Almost four years after Summers' discharge, the employer discovered that Summers had falsified over 150 company records made during the course of his employment. The court relied on the rationale of *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, the Court held that an adverse employment decision, although substantially motivated by the employee's constitutionally protected conduct, does not justify relief if the employer can show that it

would have made the same decision for permissible reasons had the protected conduct not occurred. *Mt. Healthy*, 429 U.S. at 285-286. In *Summers* the court assumed that the employer's motive in discharging Summers was illegal in concluding that "while such after-acquired evidence cannot be said to have been a 'cause' for Summers' discharge in 1982, it is relevant to Summers' claim of 'injury,' and does itself preclude the grant of any present relief or remedy to Summers." *Id.* at 708. In short, Summers suffered no legal damage. The court made it clear that the "litany of *McDonnell Douglas*" did not apply because it "presupposes a 'legitimate nondiscriminatory reason' *known* to the employer at the time of the employee's discharge." *Id.* at 704-705 *quoting McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

The Sixth Circuit Court of Appeals has adopted the approach of *Summers*. However, to prevent situations where unscrupulous employers might rummage through an employee's file for evidence of résumé fraud in order to escape legal responsibility for an otherwise unlawful discharge, the Sixth Circuit Court of Appeals has devised a three-part test. The misrepresentation or omission must (1) be material, (2) be directly related to measuring a person for employment, and (3) have been relied upon by the employer in making the decision. *Johnson v. Honeywell Information Systems. Inc.*, 955 F.2d 409, 414 (6th Cir. 1992); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302, 304 (6th Cir. 1992). The Sixth Circuit Court of Appeals views the problem of résumé fraud as one of causation. "[I]f the plaintiff would not have been hired, or would have been fired, if the employer had known of the falsification, the plaintiff suffered no legal damage by being fired." *Milligan-Jensen*, 975 F.2d at 304.

The Seventh Court of Appeals has adopted a modified *Summers* approach. In *Washington v. Lake County*, 969 F.2d 250 (7th

Cir. 1992), the court was concerned that in some cases, although an employer would be likely not to hire someone who misrepresents himself on an application, the employer might be less likely to discharge an employee who had started the job and who had proven himself capable prior to the discovery of the misrepresentation. The court found that a "résumé fraud" case was similar to the "mixed motive" cases discussed in *Mt. Healthy, supra,* and *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). "In situations involving 'after-acquired' evidence, the employer must show by a preponderance of evidence that, if acting in a [non-discriminatory] manner, it would have made the same decision had it known of the after-acquired evidence." *Washington,* 969 F.2d at 255.

The Eleventh Circuit Court of Appeals is the only appellate court to reject the approach in *Summers.* In *Wallace v. Dunn Construction Co.,* 968 F.2d 1174 (11th Cir. 1992), an application fraud case, the court reviewed *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), a suit which was brought under Title VII and decided after the *Summers* decision. The court understood *Price Waterhouse* to mean that the after-acquired evidence could not be used to ignore the "time lapse between the unlawful act and the discovery of a legitimate motive . . . " *Id.* at 1180. The court held that after-acquired evidence is relevant to the relief due and then created a complex format concerning possible damages under Title VII and the Equal Pay Act, various remedies available to the plaintiff, and evidence an employer may use to restrict its exposure. In the dissent, Judge Godbold reasoned that the plaintiff did not have standing to maintain the suit. According to Judge Godbold, once it is determined that the plaintiff would not have been hired had the application fraud been known to the employer, that ends the inquiry. The status that would place the plaintiff in the protected group of employees "was fraudulently obtained and but for her fraud would have been

denied." *Id.* at 1188. Judge Godbold distinguished *Summers* on the basis that it was late-discovered misconduct of an employee who was rightfully a member of the workforce.

We disagree with the majority opinion in *Wallace*. *Price Waterhouse* does not relate to the relief to which a victim of forbidden discrimination in employment is entitled. Rather, *Price Waterhouse* is concerned with the factors that constitute liability for unlawful employment discrimination. *See Price Waterhouse*, 490 U.S. at 244-45 ("[T]he defendant may avoid a finding of liability [footnote omitted] only by proving that it would have made the same decision even if it had not allowed gender to play such a role."). The issue faced in *Summers*, and in the present action, is whether the plaintiff was injured by the forbidden discrimination. The focus is the appropriate remedy rather than the cause of a defendant's employment decision.

Accordingly, we hold that the after-acquired evidence doctrine is applicable to the facts in this action. To safeguard against employer abuse, we adopt the three-part test set forth by the Sixth Circuit Court of Appeals in *Johnson* and *Milligan-Jensen*.

2. The Misrepresentations

Since Ms. Mardell alleges that there are issues of fact concerning the falsity of her representations on her résumé and job application, the misrepresentations require discussion.

It is undisputed that Ms. Mardell misrepresented on both her résumé and job application that she had received a bachelor of science degree in 1977 from the University of Pittsburgh when in fact she did not earn a college degree until she completed five credits in the 1992 fall term. We find it incredible that Ms. Mardell was unaware that she did not have a college degree when she applied for the position of Regional Director at Harleysville Life Insurance Company.

The following alleged misrepresentations on Ms. Mardell's résumé and job application concern employment and professional experience. On her résumé Ms. Mardell indicated that her professional experience included being a "writer-interviewer" for Mercy Hospital's in-house publication "as part of the public relations staff." She represented that as a writer-interviewer she "[d]id extensive research and development and personal interviewing." On her application Ms. Mardell wrote that she was employed part-time by Mercy Hospital between September 1972 and September 1973 receiving a salary of $5,000. Also on her résumé under professional experience Ms. Mardell represented that she was a "therapist." She described experience as a therapist as doing "individual, family and group counseling for South Hills Mental Health Center" and that she "conceived and implemented new procedures for counseling groups in high schools." On her job application Ms. Mardell wrote that between September 1973 and October 1974 she worked as a therapist at South Hills Mental Health Center receiving a salary of $8,500. Her reason for leaving the job as a therapist was "not enough money." Lastly, Ms. Mardell listed her professional experience to include "public relations director."[2] As a public relations director Ms. Mardell represented that she "[m]arketed and sold group packages for Quality Inn Motel" and that she "[d]eveloped new concepts for promotion, handled office budget, and supervised office staff." She wrote on her job application that she worked at the Quality Inn between September 1973 and October 1974.

It is uncontested that Ms. Mardell lied when she wrote that she was paid for her "employment" as a "therapist" at South

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[2]Ms. Mardell also listed under professional experience on her resume and as employment on her job application "instructor-evaluator" at Alcoa between January 1957 and April 1958 and as an agent and registered representative for Prudential Life Insurance with marketing and sales experience. Ms. Mardell began employment with Prudential in March 1977 and was working there at the time she applied for the position at Harleysville.

Hills and "writer-interviewer" at Mercy Hospital. Discovery unveiled that her connection with those institutions was part of her field work for undergraduate classes in psychology and journalism at the University of Pittsburgh. Thus, she was never employed by either of the institutions. Moreover, Ms. Mardell was at Mercy Hospital during the fall term of the 1975-1976 school year and not working part-time at Mercy between September 1972 until September 1973. Although Ms Mardell did write and interview at Mercy Hospital, this was part of her academic field course as opposed to a position or job at Mercy. Again, at South Hills, while Ms. Mardell may have done some counseling as part of her course work during the fall term of 1975 and/or winter term of 1976, it did not represent employment as a paid therapist for South Hills between September 1973 and October 1974, a reasonable inference from her résumé and job application.

Regarding her work as a public relations director at the Quality Inn Motel, Ms. Mardell has admitted that she exaggerated her job responsibilities. She testified that her principal work was as a desk clerk, that her marketing concepts were never implemented, that she supervised other desk clerks only when the manager was not present, and that she did not handle the office budget.

To summarize, we find that on her résumé and job application Ms. Mardell (1) misrepresented herself as being a college graduate, (2) misrepresented herself as having paid, professional experience in therapy and writing/interviewing when this experience was in fact for college course work, (3) misrepresented the dates she did her college field work at Mercy Hospital and South Hills, (4) falsified her reason for leaving her "job" at South Hills, and (5) exaggerated her employment responsibilities while working at the Quality Inn Motel.

3. Application of the *Johnson* test.

As stated above, *Johnson* requires that the misrepresentation or omission "was material, directly related to measuring a candidate for employment, and was relied upon by the employer in making the decision." *Johnson*, 955 F.2d at 414.

In his affidavit Mr. Mangum states that he made his decision to hire Ms. Mardell because he felt she was the best qualified of the candidates. In making his decision, Mr. Mangum considered that Ms. Mardell had a college degree as well as the professional experience listed on her résumé and job application. He believed Ms. Mardell appeared to be a person of integrity and honesty. It is Mr. Mangum's philosophy to look for a pattern of success from a prospective employee, notwithstanding the previous fields of endeavor. Mr. Mangum does not believe that academic field work as a therapist and writer-interviewer qualifies as professional experience. The veracity of the information provided in an application for employment and/or résumé is important to Mr. Mangum. Mr. Mangum declares he would not have hired Ms. Mardell had he been aware or become aware, prior to deciding to hire Ms. Mardell, that she had falsified and misrepresented on her résumé and job application, as well as during his interview with Ms. Mardell, the fact that she had a college degree and employment of the type and duration listed.

Mr. Forloine was the other employee who participated in the decision to hire Ms. Mardell. Mr. Forloine relied on the same misrepresentations as did Mr. Mangum. Mr. Forloine states that integrity, honesty and reliability of employees were and remain three of the qualifications for a position at Harleysville. In his notes of his interview with Ms. Mardell, Mr. Forloine noted as a plus that Ms. Mardell had a college degree. Mr. Forloine declares that had he known before Mr. Mangum's decision to hire Ms. Mardell that Ms. Mardell had falsified and misrepresented on her job application and résumé her degree status and a

substantial portion of her other experience and qualifications, he would have strongly advised she not be hired.

Mr. Forloine was Ms. Mardell's direct supervisor when he became senior vice-president of marketing and sales and it was his decision to terminate Ms. Mardell in May 1988. Mr. Forloine states that had he become aware of Ms. Mardell's falsifications and fabrications during her employment, he would have immediately fired her. Mr. Forloine attests that this was consistent with Harleysville policy as stated on the job application form. Lastly, given what Harleysville now knows about Ms. Mardell's misrepresentations on her job application and résumé, Mr. Forloine asserts that Harleysville would never employ her.

Thus, the uncontested affidavits of Messrs. Mangum and Forloine show that Harleysville relied on the misrepresentations presented in Ms. Mardell's résumé and job application. Harleysville has also demonstrated that it uses past job experience for measuring a job candidate and considers honesty and integrity a qualification for employment. Lastly, Harleysville has shown that Ms. Mardell's résumé and application fraud were such that Ms. Mardell would not have been hired had Harleysville known of the misrepresentations and that Ms. Mardell would have been terminated upon discovery of the misrepresentations. Ms. Mardell has not rebutted any statements of Harleysville that it would not have hired her had she truthfully completed the job application and not falsified her résumé. Nor is there any evidence that Harleysville has failed to terminate an employee for misrepresentations as serious as hers.

We disagree that the misrepresentations do not meet the requisite level of severity. *See, e.g., Dotson v. United States Postal Service*, 977 F.2d 976 (6th Cir. 1992) (Having lied on his employment application concerning prior employment, state of

health and use of prescription drugs, the plaintiff lacked the honesty and trustworthiness required of an United States Postal Service position); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992) (The fact that plaintiff omitted from her job application a DUI conviction rather than the conviction itself satisfied the materiality, relatedness, and employer reliance criteria); *O'Driscoll v. Hercules. Inc.*, 745 F. Supp. 656 (D. Utah 1990) (That plaintiff misrepresented on her employment application her age, age of her children, year of high school graduation and the fact that she had never previously applied for work with the employer fulfilled the seriousness requirement of *Summers* and were not simply misunderstandings.).

Potential employees who wish to present themselves in the best possible light might puff. Plaintiff went beyond simple puffery and lied about her education and job experience. As stated by a district court, "[i]t would distort the purpose of these causes of action to allow a plaintiff to recover from an employer against whom the plaintiff had committed misconduct, such that, had the employer known of the misconduct, the employer would certainly have terminated the plaintiff." *O'Driscoll*, 745 F. Supp. at 660-661.

Accordingly, we find that no genuine issues of material of [sic] fact exist and Harleysville is entitled to judgment as a matter of law.

An order follows.

/S/ BARRON P. MCCUNE

BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NANCY MARDELL, *Plaintiff,* vs. HARLEYSVILLE LIFE INSURANCE COMPANY, *Defendant.*	**Civil Action No. 91-1493**

ORDER

AND NOW, April 27, 1993, the motion for summary judgment filed by Harleysville Life Insurance Company is granted.

/S/ BARRON P. McCUNE

BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

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APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3258

NANCY MARDELL,

Appellant

v.

HARLEYSVILLE LIFE INSURANCE COMPANY,
a Pennsylvania Corporation

(D.C. Civil No. 91-01493)

Before: BECKER, LEWIS, *Circuit Judges*
and YOHN, *District Judge**

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by Appellee, having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

BY THE COURT:

/s/ EDWARD R. BECKER

Circuit Judge

Dated: Sep 21 1994

*The Honorable William H. Yohn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX IV

29 U.S.C.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for

purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

42 U.S.C.

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-5. Enforcement Provisions

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e—3(a) of this title.